(21,155.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 150.

HARRY T. HERNDON, PROSECUTING ATTORNEY OF CLINTON COUNTY, MISSOURI, AND JOHN E. SWANGER, SECRETARY OF STATE OF THE STATE OF MISSOURI, APPELLANTS,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 27, 1909.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered that there was filed in the office of the Clerk of the United States Circuit Court for the St. Joseph Division of the Western District of Missouri, on the 7th day of September, A. D. 1907, a Bill in Equity, in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States for the Western District of Missouri:

Your orator, The Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a citizen of each of said states, brings this its bill of complaint against Harry T. Herndon, as Prosecuting Attorney of the County of Clinton, State of Missouri, and a citizen and resident of the said County of Clinton, and State of Missouri, and of the Western District thereof, and John E. Swanger, Secretary of State of the State of Missouri, and a citizen and resident of Sullivan County, and State of Missouri, and Western District thereof, and thereupon avers.

First.

2 Your orator, The Chicago, Rock Island and Pacific Railway Company is a railway corporation duly organized and existing under and by virtue of the laws of the State of Illinois and Iowa, and a citizen and resident of said States of Illinois and Iowa, and is, by the laws of the State of Missouri, authorized to do business in said State of Missouri. It is with its railway engaged in state and interstate commerce, and operates lines of railway in the States of Illinois, Iowa, Minnesota, South Dakota, Nebraska, Wisconsin, Colorado, Arkansas, Tennessee, Louisiana, Oklahoma and Indian Territories, Kansas and Missouri.

Of the said lines of railway, the following, among others, are and for several years last past have been owned and operated by your

orator, in carrying on its business as a common carrier in transporting both state and interstate business within the State of Missouri:

(*a*) A line of railway beginning on the north line of the State of Missouri near the town of Lineville, lying in the County of Wayne, in the State of Iowa; extending thence southwesterly through the counties of Mercer, Grundy, Daviess, De Kalb, Clinton, and Platte, in the said State of Missouri, to a point on the bank of the Missouri River, in said County of Platte, opposite the City of Leavenworth, in Leavenworth County, Kansas.

(*b*) A line of railway beginning at the town of Edgerton Junction, situated upon the foregoing line of railway in the said County of Platte; extending thence in a northwesterly direction through the counties of Platte and Buchanan in the said State of Missouri, to a point on the bank of the Missouri River in said County of Buchanan, opposite the City of Atchison, in Atchison County, Kansas.

(*c*) A line of railway beginning at the town of Altamont, situated on the first mentioned line of railway of your orator in the County of Daviess; extending thence in a westerly direction through the counties of Daviess, De Kalb, and Buchanan in the said State of Missouri, to the City of St. Joseph, in said County of Buchanan, and State of Missouri.

3 (*d*) A line of railway connecting with the last aforesaid line of railway, at the said City of Saint Joseph in the said County of Buchanan, and running thence southerly through the said County of Buchanan to the town of Rushville, in said County of Buchanan, where it connects with the aforesaid line of railway (*b*) running from Edgerton Junction, aforesaid, to a point on the Missouri River, in the said County of Buchanan, opposite the City of Atchison, Kansas.

(*e*) From Cameron Junction, situated on the first mentioned line of railway of your orator in the County of Clinton, aforesaid, your orator possesses trackage rights, with the right to do all business of a common carrier over the tracks of the Chicago, Burlington and Quincy Railway Company, in a southeasterly direction through the counties of Clinton, Clay and Jackson, in the said State of Missouri, to the City of Kansas City in said County of Jackson and State of Missouri. Said trackage rights will exist for a long term of years.

(*f*) From the aforesaid City of Kansas City in the said County of Jackson, State of Missouri, your orator possesses trackage rights, with the right to do all business of a common carrier, over the tracks of the Chicago, Burlington and Quincy Railway Company, in a northerly direction through the counties of Jackson, Clinton, Platte, and Buchanan, in the said State of Missouri, to the aforesaid town of Rushville, in said County of Buchanan and State of Missouri. Said trackage rights will exist for a long term of years.

And your orator alleges that the aforesaid line of railway (*a*), running from the north line of the State of Missouri, near the town of Lineville, lying in the County of Wayne, in the State of Iowa, in a southerly direction to a point on the bank of the Missouri River, in the County of Platte, opposite the City of Leavenworth, in Leavenworth

County, Kansas, was constructed and completed in the fall
4 of 1871, by the Chicago and Southwestern Railway Company, and as it was completed, possession of the same was assumed by The Chicago, Rock Island and Pacific Railroad Company, a railway corporation organized and existing under and by virtue of the laws of the State of Illinois and Iowa, under an arrangement to operate it on account for the Chicago and Southwestern Railway Company until some permanent arrangement should be made between the two companies. Said the Chicago and Southwestern Railway Company was a consolidated corporation under the laws of Missouri and Iowa, being a consolidation, on September 25th, 1869, of the Chicago and Southwestern Railway Company of Iowa, and the Chicago and Southwestern Railway Company of Missouri, said last mentioned corporation being chartered by the Legislature of the State of Missouri, on March 3rd, 1869, to construct a railroad located as follows:

"The western terminus of said Chicago and Southwestern railroad is hereby fixed at a point on the Missouri River, in Platte County, opposite or nearly opposite to the city of Leavenworth, Kansas; and said Company may build, maintain and operate a branch railroad from the most practicable point on the line of said road to the northern boundary line of this state, in the direction of Ottumwa, in the State of Iowa."

Said consolidated corporation, the Chicago and Southwestern Railway Company, was consolidated, and the aforesaid line of railway constructed under and by virtue of a full compliance with an act of the Legislature of the State of Missouri, approved March 2nd, 1869, and an act of the Legislature of the State of Missouri, approved March 24th, 1870, which acts are respectively as follows:

"An Act to Authorize the Consolidation of Railroad Companies in this State with Companies Owning Connecting Railroads in Adjoining States.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. That any railroad company organized under the general, or special laws of this state, whose track shall at the line of the state
5 connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed.

SEC. 2. Such consolidation shall not be made, however, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated, at some meeting called expressly for that purpose, or by the approval of the same by

the holders of the same amount of stock in each of said companies, in writing and signed by them.

SEC. 3. When the terms of said consolidation shall have been agreed upon, as above stated and approved in one or the other of the modes above set forth, it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement and the resolution of consolidations, and the name adopted for the new company, shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation and of the corporate name of the consolidated company; provided, that whenever at any place on the line of this state, two or more railroads in this state are competing for the business to or from any railroad, in an adjoining state, and a consolidation of either or such competing roads with the road in an adjoining state would diminish or prevent such competition, then, and in such case, consolidation shall not be permitted under this act, and in case any railroad in this state shall hereafter intersect any such consolidated road, said road, or roads, shall have the right to run their freight cars, without breaking bulk, upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road, or roads, on fair and reasonable terms, and the same may be enforced by appropriate legislation; and, provided, further that the state reserves to itself the right to guarantee to any road that may hereafter be built to any such point, the right to make a fair contract for the transportation of freight and passengers with such consolidated road, and in case any such railroad company shall consolidate or attempt to consolidate with a connecting road contrary to the provisions of this act, any person or party aggrieved may bring action against them in the Circuit Court of any County through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise.

SEC. 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this state, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place.

SEC. 5. This act shall take effect and be in force from and after its passage.

Approved March 2nd, 1869.

6 "An Act to Amend Chapter Sixty-three of the General Statutes, Entitled "Of Railroad Companies," so as to Authorize the Consolidation, Leasing and Extension of Railroads.

Be it enacted by the General Assembly of the State of Missouri, as follows:

"SEC. 1. Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract, fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies, or roads except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate, in whole, or in part, when by so doing, it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate, or attempt to consolidate their roads, contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the Circuit Court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise. And in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads, shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads, on fair and reasonable terms, and the same may be enforced by appropriate

legislation. Before any railroad companies shall consolidate their roads, under the provisions of this act, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents, and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of
7 the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

SEC. 2. That the said chapter is hereby amended by adding thereto an additional section, to-wit: "Section 52. Any railroad company heretofore incorporated, or hereafter organized in pursuance of law, may, at any time, by means of subscription to the captial stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build or buy, or lease a railroad in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively, or any railroad company, duly incorporated and existing under the laws of an adjoining state, or of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state; provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party, or parties to such agreements, whereby a railroad in this state may be aided, purchased, leased, sublet, or affected by such arrangement shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person, or by pro- shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing and a certificate thereof signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State; and provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this

state, or make arrangements for operating the same, as provided in this act, or shall extend its railroad into this state or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state, and a corporation in this state leasing its road to a corporation of another state, shall remain liable as if it operated the road itself; and a corporation of another state being the lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other; and a corporation of another state being the lessee as aforesaid, or extending its rail-
8 road, as aforesaid, into or through this state, shall establish and maintain an office, or offices in this state, at some point or points on the line of the roads so leased or constructed and operated, at which legal process and notice be served as upon railroad corporations of this state.

SEC. 3. Section twenty-two of the chapter aforesaid shall be amended to read as follows: "Section 22. Any county court, city council, or trustees of any town refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of mandamus, to be sued out of the Circuit Court of the county.

SEC. 4. Any railroad company in this state shall have the right to take and hold all necessary grounds for depots and side-tracks, and if the title thereto cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured, such company may proceed to condemn the same in the same manner and with the same effect as is now provided by chapter sixty-six of the General Statutes of the State of Missouri, entitled "Of the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes," and of any act amendatory thereof.

SEC. 5. Section twelve of the chapter aforesaid is hereby repealed.

SEC. 6. This act shall take effect and be in force from and after its passage.

Approved March 24th, 1870."

9 And your orator further alleges that the aforesaid line of railway (*b*) extending from Edgerton Junction situated on the Chicago and Southwestern Railway in the said County of Platte, to a point on the bank of the Missouri River in the said County of Buchanan opposite the said City of Atchison, in Atchison County Kansas, was constructed and completed by the aforesaid Chicago and Southwestern Railway Company in the year 1872, after the aforesaid Chicago and Southwestern Railway Company, the consolidated corporation of Missouri and Iowa had been consolidated on August 16, 1871, with "The Atchison Branch of The Chicago and Southwestern Railway," a corporation organized on November 25th, 1870,

under the laws of the State of Missouri, to construct a railway "from a point on the Chicago and Southwestern Railway in the city of Plattsburg, County of Clinton, in the State of Missouri, to a point on the Missouri River in Buchanan County, Missouri, opposite the city of Atchison in the State of Kansas."

And your orator further alleges that The Chicago, Rock Island and Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, guaranteed the bonds of the said Chicago and Southwestern Railway Company, and entered into a perpetual agreement and lease with said roads, and in pursuance thereof took charge of and operated said lines of railway; that the interest on the said bonds was never earned, or paid, and under and — virtue of the said agreement with the said The Chicago, Rock Island and Pacific Railroad Company, the mortgages were foreclosed and the property of the said Chicago and Southwestern Railway Company sold at judicial sale, and in strict compliance with the provisions of the laws of the State of Missouri, to the Iowa Southern and Missouri Northern Railroad Company, a corporation organized on August 29th, 1876, under and by virtue of the laws of the
10 State of Iowa, for the purpose of "The purchase, improvement, (by construction of a double track and otherwise) maintenance and operation of the railway now known as the main line of the Chicago and Southwestern Railway, etc."

And your orator further alleges that the aforesaid The Chicago, Rock Island and Pacific Railroad Company, organized and existing, as aforesaid, under and — virtue of the laws of the States of Illinois and Iowa, was on the 2nd day of June, 1880, consolidated with, among other railway corporations of the State of Iowa, the aforesaid railway company, the Iowa Southern and Missouri Northern Railroad Company, a corporation organized and existing, as aforesaid, under and — virtue of the laws of the State of Iowa, said consolidated corporation becoming a consolidated corporation of the States of Illinois and Iowa, and its name being changed to The Chicag, Rock Island and Pacific Railway Company. Said consolidation was approved by the stockholders of all the constituent companies, and each of the parties thereto did respectively and severally grant bargain, sell, release, convey, assign, transfer and set over unto The Chicago, Rock Island and Pacific Railway Company, the consolidated corporation thereby created, the several and respective railroads, railroad lands, rights of way, stations, station grounds, lands, lots, bridges, cars, locomotives, rolling stock, tools, machinery, fuel, timber, iron, stone, materials and goods and chattels; and all and singular the several and respective bonds, bills, notes, accounts, demands, money and things in action; and all and singular their several and respective estates, property and effects real and personal, movable and immovable, wheresoever, howsoever and by whomsoever held, and all and singular the several and respective corporate and other franchises, rights, privileges and immunities; and did mutually agree and declare that the same should from the exe-

cution of the said articles of consolidation be held and pos-
11 sessed by the said consolidated corporation, its successors, and assigns, forever, to and for its own use, benefit, and behoof forever, to all intents and purposes.

And your orator further alleges that the aforesaid consolidated corporation, The Chicago, Rock Island and Pacific Railway Company, and your orator are one and the same corporation, and that since the said 2nd, day of June, 1880, your orator has continuously and does now own, maintain, operate and control all of the aforesaid lines of railway situated within the State of Missouri, used as aforesaid in the transportation of both state and interstate commerce, as heretofore set forth.

And your orator further alleges that the aforesaid lines of railway (*c*) and (*d*) running from Altamont, aforesaid, to Saint Joseph, aforesaid, and from the said City of Saint Joseph, aforesaid, to the town of Rushville, aforesaid, were consolidated and completed during the years 1885 and 1886, by The Saint Joseph and Iowa Railroad Company, a railroad corporation incorporated by the Legislature of the State of Missouri, by acts approved January 22nd 1857, February 23rd, 1853; February 24th, 1853, November 5th, 1857, and March 19th, 1866.

And your orator further alleges that previous to the construction of the last mentioned lines of railway the Legislature of the State of Missouri had passed an act approved on March 26th, 1881, which was a subsisting and binding law at the time of said construction, which statute was as follows:—

"An Act to Amend Section Seven Hundred and Ninety, Chapter 21, Article 2, of the Revised Statutes of the State of Missouri, Entitled "Railroad Companies."

Be it enacted by the General Assembly of the State of Missouri, as follows:—

SECTION 1. Section seven hundred and ninety of the Revised Statutes of the State of Missouri, is hereby amended by striking
12 out the words "and adjoining," in the twenty-first line of said section and inserting in lieu thereof the word "any"; and such section, as so amended, shall read as follows, viz :

SEC. 790. May Aid Construction of Other Roads.—Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate in the manner provided in the preceding section, with any railroads in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance

of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company, duly incorporated and existing under the laws of any state of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state, upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state, concerning railroad corporations, as fully a- if incorporated in this state; provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected, until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let, consolidated or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner, as they shall designate, sixty days' public notice thereof having been previously given, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State; And provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangements for operating the same, as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state, shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state, shall remain liable as if it operated the road itself and a corporation of another state being the lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued, in all cases and for the same causes, and in the same manner, as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state being the lessee
13 as aforesaid, or extending its railroad, as aforesaid, into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state.

Approved March 26, 1881."

And your orator further alleges that upon the completion of the aforesaid lines of railway by The Saint Joseph and Iowa Railroad Company, aforesaid, and on the 1st day of July, 1885, the said The Saint Joseph and Iowa Railroad Company, entered into a traffic and operating agreement with your orator, The Chicago, Rock Island and Pacific Railway Company, for the operation and control of the said lines of railway; that on the 29th day of December, 1888, your orator The Chicago, Rock Island and Pacific Railway Company purchased of the said The Saint Joseph and Iowa Railroad Company and the said The Saint Joseph and Iowa Railroad Company, under and in full compliance with the laws of the State of Missouri, granted, bargained, sold, assigned, conveyed, and transferred to your orator, The Chicago, Rock Island and Pacific Railway Company, its successors, or assigns, all and singular the rights, franchises, powers, privileges, and immunities possessed by it, together with all and singular the railway of the said The Saint Joseph and Iowa Railroad Company in the State of Missouri, being the aforesaid lines of railway extending from the said town of Altamont, in Daviess County, Missouri, to the said City of Saint Joseph, in Buchanan County, Missouri, and from said City of Saint Joseph to the said town of Rushville, in said Buchanan County, Missouri, including, also, all the railway, rights of way, depot grounds and all lands used in connection with the operation and maintenance of said railway, and all tracks, bridges, viaducts, culverts, fences, and other structures and equipment; and that continuously since the said 29th day of December, 1888,
14 up to and including the present time, your orator has been the owner of said lines of railway and has controlled, managed and operated the same during all of said period, and does now own, control, manage and operate all of the aforesaid lines of railway situated within the State of Missouri, as aforesaid, and used in the transportation of both state and interstate commerce, as heretofore set forth.

And your orator further alleges that it has various other lines of railway within the State of Missouri, which it controlled and owned prior to the 1st day of March, 1907.

And your orator further alleges that of the lines of railway maintained and operated by your orator in the transaction of its business as a common carrier of state and interstate commerce, those from Chicago and from the States of Illinois, Iowa, Minnesota, South Dakota and Wisconsin, connect with the aforesaid lines of railway maintained and owned by your orator in the State of Missouri at the said town of Lineville, in said County of Wayne and State of Iowa; and that at the said cities of Saint Joseph and Kansas City, in the counties of Buchanan and Jackson respectively in the said state of Missouri, the aforesaid lines of railway maintained and owned by your orator in the State of Missouri connect and form through lines of railway with the lines of railway maintained and owned by your orator in the States of Kansas, Nebraska, Colorado, Arkansas, Tennessee, Louisiana, Oklahoma and Indian Territories.

And your orator further alleges that having theretofore filed with the Secretary of State of the State of Missouri a copy of the Articles

or Charter of Incorporation, duly authenticated by the proper authority, and having fully complied with all the provisions of an Act of the Legislature of the State of Missouri, entitled:

15 "An Act to amend section 2 of an act entitled "An act to require every foreign corporation doing business in this state to have a public office or place of business in this state, at which to transact business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees," Approved April 21, 1891."

Approved March 11, 1895.

Sam B. Cook then duly elected and acting Secretary of State of the State of Missouri, on the 22nd, day of November, 1902, duly issued and delivered to your orator a certificate that it has duly complied with the laws of the State of Missouri, and that it is authorized to do business therein, and that said certificate has never been canceled or withdrawn, and that it is now in full force and effect, and that it is in the words and figures, following, to-wit:

Whereas, the Chicago, Rock Island and Pacific Railway Company, incorporated under the laws of the States of Illinois and Iowa, has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects complied with the requirements of law governing Foreign Private Corporations,

Now, therefore, I, Samuel B. Cook, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said Chicago, Rock Island and Pacific Railway Company is from the date hereof duly authorized and licensed to do business in the State of Missouri for a term ending June 3rd, 1930, and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State, and that the amount of the capital stock of said Corporation is Seventy Five Million Dollars, and the amount of said capital stock represented in the State of Missouri is Eight Million Dollars, Three Million of which were invested in Missouri prior to April 21st, 1891.

In testimony whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri.

Done at the City of Jefferson, this 22nd day of November, A. D. Nineteen Hundred Two.

[SEAL.]

SAM. B. COOK,
Secretary of State,
By J. H. EDWARDS,
Chief Clerk.

16 **Second.**

Your orator further alleges that this cause arises under the Constitution and laws of the United States, as hereinafter more particularly stated, and your orator further alleges that this action is of a civil nature, and that it involves a controversy between citizens of different states, and that the matter in dispute in said controversy exceeds, exclusive of interest and costs the sum and value of two thousand dollars.

Third.

Your orator further alleges that the defendant, Harry T. Herndon, is the duly elected and qualified Prosecuting Attorney of the County of Clinton in the State of Missouri, and is a citizen and resident of said Clinton County, Missouri, and of the Western District thereof; that the defendant John E. Swanger, is the duly elected and qualified Secretary of State of the State of Missouri, and a citizen and resident of Sullivan County, and State of Missouri and of the Western District thereof. Neither of said defendants is a citizen or resident of the State of Illinois nor the State of Iowa.

Fourth.

Your orator further alleges that at the regular session of the 1907 Session of the Legislature of the State of Missouri, the following law was passed by the said Legislature and approved March 19th 1907. Said law contained an emergency provision making it effective from and after its passage:

16a "Be it Enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. That section 1075 of article 2, chapter 12, of the Revised Statutes of Missouri, 1899, as amended by the session acts of 1905, at pages 107 and 108, approved April 17, 1905, be and the same is hereby repealed, and a new section enacted in lieu thereof, to be known as section 1075, and relating to railroad companies, and which shall read as follows:

SECTION 1075. Every railroad corporation in this state which now is, or may hereafter be, engaged in the transportation of persons or property, from one point in this state to another point in this state, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportations of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junction of branch railroads of the same system as herein defined, carrying passengers, and at the several stopping places; and shall, at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or may hereafter be made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build, and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains at such junction, or railroad crossing, and shall keep such depot or passenger house, or rooms warm, lighted and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive

all passengers and baggage for, and to stop, on a flag, or signal all trains carrying passengers, at the junction of all branch railroads of the same system, which said branch railroads are eighteen miles or more in length and at the terminus of which is located any county seat town of any county in this state a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting intersecting, or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning, operating or leasing any railroad in this state shall keep all its depots stations, or passenger houses, whether located at the crossing or intersection of other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "Railroad corporations," as used in this act, shall include the term "Railway company and railway corporation."

SEC. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places, constitutes an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage."

Your orator further alleges that at the same session of the
17 Legislature of the State of Missouri, the said Legislature passed the following act, which was approved March 13th, 1907, and became effective June 14th, 1907:

"Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this state, shall, without the consent of the other party, in writing, to any suit or proceeding, brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, the license, permit, certificate of au-

thority and all right of such corporation and its agents to carry passengers and all right of such corporation and its agents to carry passengers or freight, from one point in this state to another point in this state, shall forthwith be revoked by the secretary of state and its right to do such business shall cease, and the secretary of state shall publish such revocation in some newspaper of large and general circulation in the state, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this state to another point in this state or to do business as a carrier of passengers or freight, of any kind from one point in this state to another point in this state at any time within five years from the date of such revocation of the cessation of such right. But the revocation of such license, permit right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point without this state, or from a point without this state to a point within this state, or from making what are known as interstate shipments and transportation.

SECTION 2. If any corporation included in the provisions of this act, shall carry, or att-mpt to carry, or hold itself out to carry passengers or freight of any kind from one point in this state to another point in this state, without a license, permit, or certificate of authority therefor first had and obtained from the state of Missouri, — to be issued by the Secretary of State.— or after its
18 license, permit, right, or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall have been revoked or ceased, as provided for by the preceeding section of this act, it shall forfeit and pay to the state of Missouri for each offense a penalty of not less than two thousand dollars, nor more than ten thousand dollars, suit to be brought therefor, in any court of competent jurisdiction by the attorney-general, or the prosecuting attorney of any county in the state in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated, or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney-general or any prosecuting attorney to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed."

And your orator further alleges that both of said defendants are by the aforesaid laws required to do and perform certain special duties with respect thereto.

Fifth.

Your orator further alleges that on the 1st day of January, 1905, it entered into the agreement heretofore mentioned with the Chicago, Burlington and Quincy Railway Company, and the Chicago, Burlington and Quincy Railroad Company, providing for the trackage rights of your orator over the tracks of the Chicago, Burlington and Quincy Railway Company between Cameron Junction and Kansas City, aforesaid; that by the terms of said agreement your orator ac-

quired the right for a long term of years not only of running its trains over the tracks of the said the Chicago, Burlington and Quincy Railway Company between Cameron Junction and Kansas City, aforesaid, but, with certain exceptions regarding express business, the full and unrestricted right to do all business of a common carrier at any and all points upon and over said joint property and the right to run, operate and manage its trains, locomotives and cars of all classes in the conduct of its business as a common carrier in common with the said the Chicago, Burlington and Quincy

19 Railway Company; that the town of Lathrop is a town of about 1,000 inhabitants, and is situated in Clinton County, Missouri, upon the aforesaid line of railway running between Cameron Junction and Kansas City; that your orator under and by virtue of the aforesaid agreement of January 1st, 1905, has the right to do and does do all the business of a common carrier at the said station of Lathrop, and there receives and delivers both freight and passengers from or to all points on its system; that your orator for the purpose of caring for its business as a common carrier at the said station of Lathrop stops a morning and an evening passenger train each way every day at said station- No. 261 and No. 201, both westbound arriving at Lathrop at 6:28 A. M. and 6:33 P. M., respectively, and No. 202 and No. 262, both eastbound arriving at Lathrop at 9:50 A. M., and 7:00 P. M. respectively. In addition to the foregoing passenger trains, your orator stops trains No. 984, eastbound, and No. 985, westbound, which are local freight trains regularly carrying passengers, and arriving at the said station of Lathrop at 2:27 P. M., and 9:40 P. M. respectively. Your orator further shows to the Court that it runs a fast through passenger train between Chicago and Fort Worth and Dallas, Texas, No. 211, and No. 212, by means of its connecting carriers in the State of Texas, and a fast through passenger train between Chicago and the Pacific Coast, No. 203 and No. 204, by means of connecting carriers beyond the Territory of Oklahoma, neither of which stop at the said station of Lathrop to take on or to let off passengers; that said trains, No. 211 and 212, which do not stop at the said station of Lathrop are immediately preceded by the said trains, No. 261 and No. 262, which do stop at the said station of Lathrop, and which are maintained for the express purpose of collecting passengers from local stations and conveying them to nearby station- on the lines of railway of your orator where both of said fast through trains Nos. 203, 204, 211 and 212 do stop for the purpose of taking on and letting off passengers.

20 And your orator further shows to the Court that the tracks of The Atchison, Topeka and Santa Fe Railway Company cross and intersect the tracks of the Chicago, Burlington and Quincy Railway Company at the said station of Lathrop; that the said The Atchison, Topeka and Santa Fe Railway Company runs two trains each way each day upon its line of railway all of which stop at the said station of Lathrop, and all of which make close and direct connection with the aforesaid trains which your orator stops at the said station of Lathrop; that except under unusual circumstances, pas-

sengers seldom find it convenient to change from the railway of your orator to that of The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop.

And your orator further shows to the Court that to stop all of its aforesaid trains at the said station of Lathrop for the purpose of letting on and putting off passengers would be a direct, unreasonable and unwarranted interference with the interstate business of your orator, and with the aforesaid trains running between Chicago and Fort Worth and Dallas, and between Chicago and the Pacific Coast respectively, which trains are maintained primarily for the purpose of transporting the interstate passenger traffic of your orator, and for the carriage of the United States mails.

Sixth.

Your orator further alleges that the aforesaid act of March 19th, 1907, was passed with the exclusive purpose of providing for and regulating the interchange of freight and passengers at railroad junction points, and for the express purpose of providing more convenient and satisfactory train service upon all railroads situated within the State of Missouri. Your orator further alleges that the facilities for the interchange of passengers at the said station
21 of Lathrop, are amply sufficient to accommodate the public, and that its train service at said station is both convenient and satisfactory to the public.

Your orator further alleges that its aforesaid trains which stop at the said station of Lathrop afford the public every reasonable opportunity of changing to or from the aforesaid trains of The Atchison, Topeka and Santa Fe Railway Company, at the said station of Lathrop; that the stopping of all the aforesaid trains by your orator at the said station of Lathrop would not practically, or materially increase the facilities for the interchange of passengers between the trains of your orator and those of the aforesaid, The Atchison, Topeka and Santa Fe Railway Company, at said station; that any requirement by which your orator is compelled to stop its two trains at the said station of Lathrop, so primarily maintained, as aforesaid, in the transportation of passengers from Chicago to Fort Worth and Dallas and return, and from Chicago to the Pacific Coast and return, would be an unreasonable interference with and an unjust burden upon the interstate commerce of your orator, so as aforesaid transported by said trains; that the said trains which your orator does not stop at the said station of Lathrop would not and could not be maintained by your orator but for the transportation of interstate passengers who patronize said trains because of the rapid and unbroken schedules maintained by said trains; that if said trains are required to stop at all junctions with other railways and there interchange passengers with such other roads, their usefulness as through trains would be destroyed and the interstate business of your orator would be interfered with to an unwarranted extent without any corresponding benefit to the traveling public; and that the aforesaid law of March 19, 1907, so far as it applies to the aforesaid trains of your orator which do not stop at the said station of Lathrop, is a serious

burden upon the interstate commerce of your orator so transported by said trains, and an unreasonable, unlawful and unjust interference with said interstate commerce.

And your orator further alleges that that portion of the aforesaid act of March 19th, 1907, which requires all trains carrying
22 passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points is in violation of and contrary to the Act of Congress entitled, "An Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the Power of the Interstate Commerce Commission, approved June 29th, 1906," authorized by that portion of section eight of the Constitution of the United States, giving Congress, "the power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes." Your orator shows to the Court that said act to regulate the interstate commerce of the United States applies in terms to and assumes exclusive jurisdiction over all tracks and facilities of every kind used or necessary in the transportation of persons and property moving in interstate commerce, and over all rules and regulations directly and materially affecting the transportation of persons and property moving in interstate commerce. And your orator submits that forasmuch as the Constitution of the United States and the laws passed in pursuance thereof have committed to Congress and its authorized Commission the exclusive power to regulate commerce among the states and to supervise and control the instrumentalities of such commerce and withdrawn the same from every degree of interference on the part of any state or state law, or official, the said law of March 19, 1907, so far as it requires all trains carrying passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points, interfering therewith, is repugnant to said Constitution and the laws passed in pursuance thereof, and is therefore to such extent, null and void.

23 Seventh.

Your orator further alleges that that portion of the aforesaid law of March 19th, 1907, which requires all trains carrying passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points, was not passed as an exercise of the police power of the State of Missouri for the protection of the traveling public from the danger of collisions at such junction points, but solely, as aforesaid, for the purpose of increasing the facilities for the interchange of passengers and baggage, and for the more convenient and satisfactory train service at such junction points. Your orator shows to the Court, however, that on or about the 7th day of April, 1907, an interlocking plant and automatic signal device was completed and put in operation at intersection of the tracks of the Chicago Burlington and Quincy Railway Company with the tracks of The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop, which

provides an absolutely safe method and way for your orator's trains to pass over the tracks of The Atchison, Topeka and Santa Fe Railway Company without stopping. And your orator further alleges that said interlocking plant and automatic signal device is properly and carefully constructed according to a recognized standard, which is in universal use for such purposes, throughout the country; that by the use of said interlocking plant and automatic signal device, the trains of your orator are operated over and across the tracks of said The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop, with greater safety and security to the traveling public when said trains are not stopped at said point of intersection than if said trains were stopped thereat.

24 (Eighth.)

Your orator further alleges that ever since the passage of the aforesaid law of March 19, 1907, the defendant, Harry T. Herndon, as prosecuting attorney of Clinton County, Missouri, in which county the said station of Lathrop and the aforesaid crossing and junction is located, and particularly since July 21st, 1907, has threatened and still threatens, to prosecute your orator under said statute for the purpose of recovering the penalty of $25.00 per day for each day since the said 21st day of July, 1907, upon which your orator has operated some of its trains past the said station of Lathrop, and past the junction point with the said The Atchison, Topeka and Santa Fe Railway Company without stopping said trains for the interchange of passengers and baggage. Said Harry T. Herndon as prosecuting attorney of said Clinton County, proposes, threatens to, and will, unless enjoined herein, put in motion the special provisions of the said law of March 19th, 1907, for the enforcement of the said penalties of $25.00 per day, since July 21st, 1907, and, under the pain of these accumulating penalties, which in a short space of time will amount to many thousands of dollars, will, unless enjoined herein, bring suits against your orator to collect said penalties, unless your orator sacrifices the facilities it now maintains, and which circumstances compel it to maintain for the proper handling of its interstate business. And your orator shows to the Court, that as heretofore set forth, it has not stopped all of its trains carrying passengers at the said station of Lathrop, in compliance with the aforesaid law of March 19th, 1907. If your orator was compelled to stop all of its trains carrying passengers at the said station of Lathrop, and at other similar junction points in the State of Missouri, in
25 compliance with said law, your orator could not expect to secure the interstate traffic which is now carried on said passenger trains which do not stop at the said station of Lathrop, to carry such interstate traffic said trains were installed and are now maintained; and without such interstate traffic, which it now carries on said trains by reason of their rapid unbroken schedules, said trains could be operated, not only without profit, but at a loss and without any return upon the proportion of said investment within the State of Missouri, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly

of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law and guaranteeing to all persons the equal protection of the laws.

Your orator submits that while it may, having regard to circumstances, operate a train, at a loss or render such service under a fair profit therefor, yet the Legislature of the State of Missouri cannot, and the prosecuting attorney for any county in the said State of Missouri cannot compel your orator to do so, that being the taking of your orator's property for public use without returning compensation therefor, and without due process of law, and it being impossible for said Legislature of the State of Missouri, or the prosecuting attorney for any county in the said State of Missouri, to assure to your orator profit on some other service which will answer and make up such deficiency.

Ninth.

Your orator alleges that under its contract with the Government of the United States for the carriage of the United States mails, it is obliged to transport said mail on the aforesaid trains which your orator does not stop at the said station of Lathrop:—and that unless the defendant, Harry T. Herndon, as prosecuting attorney for Clinton County, Missouri, is restrained herein, he will, by the
26 *by the* imposition of said penalties, require your orator to stop said trains; and that said delay consequent upon the stopping of said trains will unreasonably hinder, delay and obstruct the carriage and delivery of the United States Mails carried by your orator, contrary to the Constitution of the United States, and the laws passed in pursuance thereof.

Tenth.

Your orator further alleges that the defendant, John E. Swanger, as Secretary of State of the State of Missouri, under and by virtue of the alleged authority in him vested, as such Secretary of State of the State of Missouri, by the terms of the aforesaid act of the Legislature of the State of Missouri, approved March 13, 1907, and which becomes effective June 14th, 1907, proposes, threatens to and will unless enjoined herein take such steps as provided in said act last aforesaid to revoke and cancel the certificate granting your orator the right to do business in the State of Missouri, issued by Sam B. Cook, as Secretary of State on the 22nd day of November, 1902, as hereinbefore stated, and to publish such revocation in some newspaper of general circulation of the state and to do all such further acts as it may be necessary to revoke said license, permit or certificate of authority as are authorized by said Act of the Legislature of the State of Missouri, approved March 13, 1907, should your orator file this, its Bill of Complaint, before this Honorable Court, the Circu*ti* Court of the United States for the Western District of Missouri and the St. Joseph Division thereof, the same being a suit or proceeding instituted in a Federal Court of the United States against the defendant Harry T. Herndon and John E. Swanger citizens of the State of Missouri. Your orator shows to the Court that acting under, by

virtue of and fully within the rights and privileges guaranteed unto your orator by the Constitution of the United States and the laws passed in pursuance thereof, it hereby files its said Bill of
27 complaint before this Honorable Court praying for the aforesaid injunction against the defendant Harry T. Herndon, as prosecuting attorney of Clinton County, Missouri, and a resident and citizen of said County of Clinton and State of Missouri, and against John E. Swanger, as Secretary of State of the State of Missouri and a resident and citizen of said County of Sullivan and State of Missouri. And your orator further alleges that because of the filing of said Bill of Complaint, and because of any other proceeding which your orator may bring in any Federal Court against any citizen of the State of Missouri, and because of any attempt your orator may make to remove any case into a Federal Court from any State Court of the State of Missouri, and by virtue of the alleged authority attempted to be given the defendant John E. Swanger, as Secretary of State of the State of Missouri by the aforesaid law of March 13th, 1907, said defendant, John E. Swanger, is now threatening to, and unless enjoined herein, by this Honorable Court, will, so far as in his power lays, revoke all authority of your orator to do business in the State of Missouri and take away the right of your orator or its agents to carry passengers of freight between points within the State of Missouri, and to deprive your orator of the use and benefit of its property permanently devoted, under invitation and contract with the said State of Missouri, to the transportation of both state and interstate business within the said State of Missouri.

Eleventh.

Your orator further alleges that pursuant to the then existing laws of the State of Missouri, as heretofore set forth, and for the purpose of availing itself of the rights, privileges and immunities therein guaranteed and for the purpose of accepting the proffered terms thereof, your orator and its predecessors, after having fully
28 and without reservation complied with the aforesaid laws of the State of Missouri, became authorized to do all of the things enumerated therein. And your orator shows to the Court that in pursuance of said invitation from the State of Missouri and in full compliance with its then existing laws, your orator and its predecessors lawfully and in good faith acquired the lines of railway heretofore mentioned and set forth. And your orator alleges that by reason of the matters and things herein alleged the State of Missouri entered into a valid, binding and subsisting contract with your orator whereby the said State of Missouri guaranteed to your orator the rights, privileges and immunities set forth in the constitution and laws of the State of Missouri, upon the same basis and to an extent identical with the rights, privileges and immunities given by said constitution and laws to railway corporations of the State of Missouri, and your orator and its predecessors agreed and undertook to construct and acquire the aforesaid lines of railway within the State of Missouri, and to provide facilities for and fully engage in both the state and interstate business of a common carrier of freight and pas-

sengers within the said State of Missouri. And your orator alleges that it and its predecessors did in good faith, and at the expenditure of thousands of dollars, accept the said invitation and the proffered agreement of the said State of Missouri, and entered said State and built and acquired property devoted entirely to its business as a common carrier of freight and passengers, which property, including not only the many miles of railway heretofore set forth, but depots, station grounds, shops, warehouses, terminals, rolling stock and other equipment necessary to the maintenance and operation of said lines of railway, now located and maintained in the said State of Missouri, for such purposes of the assessed value of $3,252,775. And your orator alleges, as aforesaid, that with said property it is en-
29 gaged in the business of a common carrier in the handling of freight and passengers on the said lines of railway between points in the State of Missouri, and from points within the State of Missouri to points outside of said State, and from points outside of the said State of Missouri, to points within said State, and between points in other states and territories, which necessarily require the carriage of freight and passengers into and through the said State of Missouri.

Twelfth.

Your orator further alleges that the aforesaid Act of the Legislature of the State of Missouri, approved March 13, 1907, and effective June 14th, 1907, heretofore set forth, is unreasonable, unjust, oppressive, unlawful, discriminative, confiscatory, null and void, for the following reasons, to-wit:

(*a*) Because said Act is contrary to and violative of Section Two of Article Three of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all controversies and cases arising under the said Constitution of the United States, the laws made under its authority, or between citizens of different States, in that said Act directly and expressly attempts to defeat the jurisdiction of the Courts of the United States of controversies arising under the Constitution of the United States and the laws passed in pursuance thereof, and of controversies between citizens of different states.

(*b*) Because said Act in attempting to confer upon the defendant John E. Swanger, as Secretary of State of the State of Missouri, the power to revoke the right of your orator to carry on its business as a common carrier between points within the State of Missouri and to deprive your orator of the use of its property for such purposes, and to forbid thereby the exercise of the rights, privileges and immunities granted to it, as aforesaid, by the Constitution and laws
30 of the State of Missouri, is an attempt to relieve the said State of Missouri from the performance of its part of the contract heretofore entered into, as aforesaid, and is contrary to and violative of Section Ten of Article One of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in that by the laws of the State of Missouri, in full force and effect at the time of your orator and its predecessors entered

the said State of Missouri, your orator and predecessors were given the same rights, powers, privileges and immunities as domestic railway corporations of the State of Missouri, in that the said Act of March 13th, 1907, in denying to your orator the judicial right it freely and fully accords to domestic corporations of the State of Missouri, of removing proper cases from the State Courts of Missouri to the Federal Courts, or of instituting suits in any Federal Court against a citizen of the said state of Missouri, which denial is an attempt to impair the obligation of the contract entered into, as aforesaid between your orator and the State of Missouri, and is contrary to and violative of Section Ten of Article One of the Constitution of the United States.

(*c*) Because said Act in attempting to empower and authorize the defendant, John E. Swanger, to pass upon the question as to whether or not suits may have been removed from the State Courts of Missouri to the Federal Court without the consent of the other party, denies your orator the right of trial by jury, and is therefore contrary to and violative of Act. Three of the Constitution of the United States and of Section Twenty-eight of Article Two of the Constitution of the State of Missouri.

(*d*) Because *of* the aforesaid lines of railway of your orator within the State of Missouri form the connecting links between its lines of railway in other States and Territories, and it is necessary to conduct its business as a common carrier of freight and passengers between other States and Territories over its said lines of rail-
31 way within the State of Missouri, and while said act purports to deny your orator the right to engage in intra-state business only yet the manifest purpose and the necessary and direct result of the purported forfeiture by the defendant, John E. Swanger, of the right of your orator to do intra-state business between points within the State of Missouri would necessarily and as a direct and intended consequence unreasonably and directly interfere with the interstate business of your orator, and would impose an intolerable and prohibitive burden upon all of such interstate commerce so passing into, from or through the said State of Missouri over the lines of railway so maintained by your orator. The said Act therefore in attempting to empower and authorize the defendant John E. Swanger, as Secretary of State of the State of Missouri, to deny and take from your orator the right to carry on its business as a common carrier between points within the State of Missouri, is therefore, contrary to and violative of Section Eight of Article One of the Constitution of the United States, which reserves to Congress the right and power to regulate commerce with foreign nations and among the several states and with the Indian Tribes. And your orator submits that forasmuch as the Constitution of the United States and the laws passed in pursuance thereof have committed to Congress and its authorized Commission the power to regulate commerce among the States and withdraws the same from every degree of interference on the part of any State or any State official, the said Act of March 13, 1907, interfering therewith is repugnant to the Consti-

tution of the United States and the laws passed in pursuance thereof and is therefore null and void.

(*e*) Because said Act, unless its enforcement is enjoined herein, affecting as it would not only its intra-state, but its interstate traffic within the State of Missouri, would so unreasonably reduce the annual gross income derived from the operation of your ora-
32 tor's lines of railway within the State of Missouri, as to become insufficient to permit your orator to operate its property in the State of Missouri without loss, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons the equal protection of the laws.

(*f*) Because said Act purporting to give the defendant, John E. Swanger, as Secretary of the State of Missouri, the right arbitrarily to deny your orator the right to do business between points within the State of Missouri, and thereby depriving your orator of the use of its property as a common carrier of freight and passengers for hire, is contrary to and violative of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and of Section Thirty of Article Two of the Constitution of the State of Missouri, which provide that no State shall deprive any person of property without due process of law*m* and that no person shall be deprived of property without due process of law.

(*g*) Because said Act, in denying to your orator, under pain of heavy penalties, the right to remove a case to the Federal Court which may be commenced in a State Court of Missouri, or the right to institute a proceeding in any Federal Court against any citizen of Missouri, thereby depriving your orator of a right to resort to the Courts of the land in an orderly manner, is contrary to and violate of Section One of Article Fourteen of the Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(*h*) Because said Act, in denying to your orator, a foreign railway corporation being now and for many years last past lawfully and properly within the jurisdiction of the State of Missouri, the
33 right of appealing to the Federal Courts for the trial of its rights or the redress of its wrongs, such right being freely and fully accorded to all domestic railway corporations of the State of Missouri and to all other persons within the State of Missouri, without condition or limitation, is contrary to and violative of Section One of Article Fourteen of the Amendments to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

(*i*) Because said Act in denying to your orator the right to appeal to the Federal Courts for the trial of its rights or the redress of its wrongs except under the pain of heavy and prohibitive penalties is contrary to and violative of Section Ten of Article Two of the Constitution of the State of Missouri, providing that the Courts of justice shall be open to every person and certain remedy afforded for every

injury to person or property, and that right and justice should be administered without sale, denial, or delay.

Thirteen.

Your orator further alleges and shows to the Court that the said Act of March 13, 1907, is inoperative, null and void, in that it is — conflict with the Constitution of the United States and the Constitution of the State of Missouri. Said Act provides that the Secretary of State shall arbitrarily and without notice or hearing terminate the right of your orator and other foreign railway companies doing business between points within the State of Missouri, and shall publish such revocation in some newspaper of a large and general circulation in the state, and that thereupon your orator and other foreign railway corporations similarly situated shall not again be permitted or authorized to carry passengers or freight between points within the State of Missouri at any time within five years
34 from the date of such revocation or the cessation of said right to do business between points within the State of Missouri. Said provisions in an arbitrary way prohibits your orator and other foreign railway companies similarly situated from making any defense to said action of the Secretary of State of the State of Missouri, and prohibits your orator and other foreign railway companies similarly situated from making any showing or assigning any reason why their right to do business between points within the State of Missouri, should not be denied. Said provisions authorize the Secretary of State or the State of Missouri to deny the right of your orator and other foreign railway corporations similarly situated to do business between points within the State of Missouri, without a hearing advice or consideration. But for said provisions and in ordinary litigation or hearing, if opportunity were offered your orator and others similarly situated, could submit in its defense and in support of its action evidence tending to show at least that even the terms of the said Act, of March 13th, 1907, had not been violated.

In the State of Missouri to every person and party save and except your orator and other common carriers of like character justice is dispensed in the courts of law freely and without default, or denial *or denial* in pursuance of the fundamental principles of the American Government, and of the Constitution of the United States and of the Constitution of the State of Missouri, and with the full and uncircumscribed right to allege and show in his defense such matters and things as by said provisions are denied to your orator and other like parties.

Wherefore, your orator submits that the said Act of March 13th, 1907, denies to your orator the equal protection of the laws, and deprives your orator *of* others similarly situated of their property without due process of law, and is repugnant to the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law and guaranteeing to all persons the equal protection of the laws.

35 Fourteen.

Your orator further alleges and shows to the Court that according to the provisions of said Act of March 13th, 1907, effective June 14th, 1907, after which date your orator and its officers and agents became subject to the penalties therein prescribed, if your orator should attempt to remove into the Federal Court a case commenced in the State Court of Missouri, of — your orator should attempt to commence a proceeding in any Federal Court against any citizen of the State of Missouri, the defendant herein, John E. Swanger, as Secretary of State of the State of Missouri, would as he has threatened to do, and as he will do, unless restrained herein, attempt to deny the right of your orator to do business between points within the State of Missouri. And if your orator, its officers and agents should carry or attempt to carry, or should hold itself out to carry passengers or freight of any kind from one point in the State of Missouri to another point in said State, after the defendant John E. Swanger, as Secretary of State of the State of Missouri, had so arbitrarily declared that the right of your orator to do business between points within the State of Missouri had ceased according to the terms of said act, your orator would be compelled to forfeit and pay to the State of Missouri for each offense a penalty of not less than $2,000, nor more than $10,000, to be recovered in any court of competent jurisdiction by the Attorney General of the State of Missouri or the Prosecuting Attorney of any county in said state in which said alleged offense shall have been committed. And your orator further alleges and shows to the court that the penalties imposed in said Act of March 13th, 1907, for the violation of its provisions are so harsh, unusual and unreasonable as to constrain your orator and other foreign railway corporations subject to the
36 provisions of said act to submit thereto, however illegal the same may be, rather than take the risk of incurring such enormous and numerous penalties as would utterly bankrupt and destroy them, and thus cause a forfeiture or loss of the entire property by them controlled; that, if your orator should refuse to obey the mandate of said act, it would, before a final determination or adjudication of the question as to its validity could be obtained, incur penalties that would exceed the assessed value of its property devoted to the carrying of freight and passengers between points within the State of Missouri.

Fifteen.

Your orator further alleges that the said Act of March 13th, 1907, is not only confiscatory of the property of your orator, but that the penalties prescribed for a violation to obey said act are so harsh, unjust, unusual, oppressive and unequal that your orator is thereby denied the equal protection of the law, and is practically precluded from the privilege of ascertaining its rights and challenging the validity of the enactment in the courts of the land. Wherefore your orator charges that the aforesaid act violates the provisions of Section One of Article Fourteen of the Amendments to the Constitution of

the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and can only have relief in a court of equity where matters of this kind are properly cognizable and relievable, your orator prays:

37 That the said defendant, Harry T. Herndon, as Prosecuting Attorney of Clinton County, Missouri, his deputies, agents and successors in office, may be forever temporarily and permanently restrained and enjoined from enforcing or attempting to enforce the provisions of the act of March 19th, 1907, so far as it relates to the stopping of the trains operated by your orator where the tracks of the Chicago, Burlington and Quincy Railway Company intersect and cross the tracks of The Atchison, Topeka and Santa Fe Railway Company at the station of Lathrop, Clinton County, Missouri, or from enforcing or attempting to enforce any of the penalties prescribed by said statute for failure to observe the provisions of said act or from prosecuting your orator in any manner whatever for a failure to observe the provisions of said act as above specified, or from acting or attempting to act under and by virtue of any powers or rights attempted to be conferred by said legislature of the State of Missouri, in said act of March 19th, 1907; that the defendant, John E. Swanger, as Secretary of State of the State of Missouri, his deputies agents and successors in office, may be forever temporarily and permanently restrained from enforcing, or attempting to enforce the provisions of said Act of March 13th, 1907, providing for the revoking and cancelling of the certificate granting your orator the right to do business in the State of Missouri, whenever your orator shall remove suits or proceedings to any Federal Court or bring certain suits or proceedings in any Federal Court against any citizen of the State of Missouri; that said Acts of March 13th, 1907, and March 19th, 1907, passed by the 1907 session of the Legislature of the State of Missouri, be declared unconstitutional, uninforcible, and not binding upon your orator. And your

38 orator prays for such other and further and different relief as in equity may be just and equitable.

And your orator further prays that in the meantime and until the hearing hereof, your orator may have a temporary restraining order embracing and including all of the relief herein prayed for, and such restraining order to continue in force until the termination of the hearing for a perpetual injunction and until the further order of this court.

And may it please your Honors, to grant unto your orator a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to said Harry T. Herndon, as Prosecuting Attorney of Clinton County, Missouri, and said John E. Swanger, as Secretary of State of the State of Missouri, thereby commanding them and each of them on a day certain therein to be named and under a certain penalty personally to be and appear before this Honorable Court, and then and there full, true, and direct and perfect answer make to all and singular the premises, but not

under oath, answer under oath being expressly waived, and to stand to, perform and abide by such order, direction and decree, as may be made against them in the premises.

And your orator will ever pray.

M. A. LAW,
PAUL E. WALKER,
Solicitors for Complainant.

39 STATE OF KANSAS,
County of Shawnee, ss:

I, A. E. Sweet, upon oath say that I am General Superintendent of The Chicago, Rock Island and Pacific Railway Company, Complainant in the above entitled bill, and as such officer have charge of the operation of said company in the State of Missouri, and of the matters and things mentioned in said bill, which I have read. I know the allegations of said bill, and the same are true of my own knowledge, except as to those matters therein stated upon information and belief, and those matters I believe them to be true.

A. E. SWEET.

Subscribed and sworn to before me this 5th day of August, 1907.
[SEAL.] LUTHER BURNS,
Notary Public.

My commission expires April 24th, 1911.

40 On the same day said Bill of Complaint was filed there was filed with the Clerk of said Court, a Restraining Order in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Saint Joseph Division, Western District of Missouri.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,
vs.
HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendant.

Restraining Order.

Now on this 6th day of September, 1907, comes the Chicago, Rock Island and Pacific Railway Company by its solicitor Paul E. Walker, and presents its verified Bill of Complaint herein praying for an injunction temporarily and permanently restraining the defendant, Harry T. Herndon, as Prosecuting Attorney of Clinton County, Missouri, his deputies, agents and successors in office from enforcing or attempting to enforce the provisions of the Act of March 19th, 1907, of the Legislature of the State of Missouri, the

same being Section 1075 of Article Two, Chapter 12, of the Revised Statutes of Missouri, 1889, as amended by the laws of Missouri for 1907, at Page 185, so far as it relates to the stopping of trains operated by complainant The Chicago, Rock Island and Pacific Railway Company, at the Station of Lathrop, in Clinton County,
41 Missouri, and from enforcing, or attempting to enforce any of the penalties prescribed by said statute for a failure to observe the provisions of said act, or for prosecuting, or attempting to prosecute the complainant, The Chicago, Rock Island and Pacific Railway Company, in any manner whatsoever for a failure to observe the provisions of said act, or from acting, or attempting to act under and by virtue of the powers and rights attempted to be conferred by said statute; and for an injunction temporarily and permanently restraining John E. Swanger as Secretary of State of the State of Missouri, his deputies, agents and successors in office, from enforcing or attempting to enforce the provisions of an act of the Legislature of the State of Missouri, approved March 13th, 1907, providing for the revoking and cancelling of the license granting the right to foreign railway corporations to do business between points within the State of Missouri, whenever such a corporation shall remove suits or proceedings to any Federal Court or bring certain suits or proceedings to any Federal Court against any citizen of the State of Missouri; and for an order declaring said act or the Legislature of the State of Missouri, approved March 13th, 1907, and said Act of the Legislature of the State of Missouri, approved March 19, 1907, to be unconstitutional, uninforcible, and not binding upon the complainant, The Chicago, Rock Island and Pacific Railway Company.

Upon reading the Bill of Complaint, and after due consideration, it having been made to appear that there is danger of irreparable injury being caused to complainant before the hearing of said application for the writ of injunction unless defendants are, pending such hearing, restrained as herein set forth, it is ordered that the application for the temporary injunction be and it is hereby set down for hearing before the United States Circuit Court at St. Joseph, Missouri, on Monday, September 16th, 1907, at 10:00 o'clock A. M., or as soon thereafter as said Court can hear the same. And it is further ordered that in the mean time and until further order of the court, the defendant, Harry T. Herndon, as Prosecuting At-
42 torney of Clinton County, Missouri, his deputies, agents and successors in office, be and they are hereby temporarily restrained from enforcing or attempting to enforce the provisions of the said Act of March 19th, 1907, so far as it relates to the stopping of the trains operated by the complainant, the Chicago, Rock Island & Pacific Railway Company at the station of Lathrop, Clinton County, Missouri, and from enforcing, or attempting to enforce any of the penalties prescribed by said statute for a failure to observe the provisions thereof, and from prosecuting the complainant The Chicago, Rock Island & Pacific Railway Company in any manner whatsoever for a failure to observe the provisions of said act as above specified, and from acting or attempting to act under and by virtue of any

of the powers or rights attempted to be confer-ed by said statute as above specified and limited; and that the defendants, John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office, be and they are hereby temporarily restrained from enforcing or attempting to enforce the provisions of said Act of March 13th, 1907, providing for the revoking and cancelling of the license granting the right to foreign railway companies to do business between points within the State of Missouri, whenever such corporation shall remove suits or proceedings to any Federal Court, or bring any suit or proceeding in any Federal Court against any citizen of the State of Missouri. It is further ordered and adjudged that said restraining order shall become effective and be binding upon the parties hereto, only after it shall have been filed with the Clerk of the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division at St. Joseph, Missouri.

Let copy of this order be forthwith served upon all of the defendants herein.

JOHN C. POLLOCK, *Judge.*

On which said Restraining Order the following Marshal's return is made in words and figures following:

43 *Marshal's Return.*

I do hereby certify that I executed this Order by delivering a certified copy of same to John E. Swanger, Secretary of State, at Jefferson City, Missouri, on September 9, 1907.

All done in the Central Division of the Western District of Missouri.

E. R. DURHAM,
United States Marshal,
By CHARLES J. MURRAY, *Deputy.*

I do hereby certify that I executed this Order by delivering a certified copy of same to Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, at Plattsburg, Missouri, on September 9, 1907.

All done in St. Joseph Division of the Western District of Missouri.

E. R. DUNHAM,
United States Marshal,
By H. C. MILLER, *Deputy.*

44 On which Bill of Complaint there was issued subpœnas in words and figures as follows, to-wit:

Subpœna.

St. Joseph Division of the Western District of Missouri, *sct.*

The President of the United States to Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, John E. Swanger, Secretary of State of the State of Missouri, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, on the first Monday of March next, at the city of St. Joseph, then and there to answer the bill of complaint of The Chicago, Rock Island and Pacific Railway Company, citizen of the State- of Illinois & Iowa, filed against you on the 7th day of September, 1907. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7th day of September, A. D. 1907.

Issued at office in the city of St. Joseph, Mo., under the seal of said Circuit Court, the day and year last aforesaid.

C. C. COLT, *Clerk.*

MEM.—The defendant- to enter their appearance in this suit in the Clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

C. C. COLT, *Clerk.*

45 UNITED STATES OF AMERICA,
St. Joseph Division of the Western
District of Missouri, sct:

I do certify that I served a Restraining Order issued in this case by Judge John C. Pollock, by delivering a duly certified copy of said Order to John E. Swanger, Secretary of State.

Done in the Central Division of the Western District of Missouri on September 9, 1907.

EDWIN R. DURHAM,
United States Marshal,
By CHARLES MURRAY, *Deputy.*

I certify that I executed the with- spa. in chancery with—restraining order attached by delivering to Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, duly certified copies of same at Plattsburg, Mo., on September 9, 1907.

Done in St. Joseph Division of the Western District of Missouri.

EDWIN R. DURHAM,
U. S. Marshal, Western District of Missouri,
By H. C. MILLER, *Deputy.*

46 On which Bill of Complaint there was issued subpœna in words and figures as follows, to-wit:

Subpœna.

St. Joseph Division of the Western District of Missouri, *sct.*

To the President of the United States to Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the St. Joseph Division of the Western District of Missouri, on the first Monday of March next, at the City of St. Joseph, then and there to answer the bill of complaint of The Chicago, Rock Island and Pacific Railway Company, citizen of the State- of Illinois & Iowa, filed against you on the 7th day of September, 1907. Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 7th day of September, A. D. 1907.

Issued at office in the city of St. Joseph, Mo., under the seal of said Circuit Court, the day and year last aforesaid.

C. C. COLT, *Clerk.*

MEM.—The defendant- to enter their appearance in this suit in the Clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

C. C. COLT, *Clerk.*

47 On which subpœna the following return was made:

UNITED STATES OF AMERICA,
St. Joseph Division of the Western
District of Missouri, sct:

I do certify that I executed this writ by delivering a true copy thereof to the within named John E. Swanger, Secretary of State of the State of Missouri, on this 13th day of Sept., A. D. 1907, at the City of Jefferson, State of Missouri.

E. R. DURHAM,
U. S. Marshal, Western District of Missouri,
By T. H. McKENNA, *Deputy.*

48 And afterwards, to-wit on the 16th day of September, 1907, the following further order was made in said case, to-wit:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

Order.

Now on this 16th day of September the above entitled cause came on for hearing, and it appearing that the September 1907 term of the above entitled court has been continued until the 7th day of October, 1907, it is hereby ordered that the hearing upon the application for a temporary writ of injunction heretofore and by order of this court issued on the 6th day of September, 1907, set down for hearing on this 16th day of September, 1907, be and the same is hereby continued until the 7th day of October, 1907, before the United States Court at St. Joseph, Missouri, at 10 o'clock A. M., or as soon thereafter as said court can hear the same. And it is further ordered that in the meantime and until the further order of the court, the restraining order heretofore and on the said 6th day of September, 1907, shall continue and be in full force and effect.

JOHN C. POLLOCK, *Judge.*

49 And afterwards, towit on the 31st day of January, 1908, the defendants in the above cause filed a Demurrer to the Bill, which demurrer is in words and figures, as follows, to-wit:

In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

Demurrer of the Above Named Defendant to the Bill of Complainant.

The above named defendants, by protestation, not confessing or acknowledging all or any of the matters and things in complainant's bill of complaint to be true in manner and form, as the same are

therein set forth and alleged, doth demur thereto and for cause of demurrer showeth:

First. That said complainant has not in said bill of complaint made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against defendant, or to any relief whatsoever.

Second. It appears upon the face of complainant's bill of complaint that complainant has an adequate remedy at law.

Third. It appears upon the face of complainant's bill of complaint that this court has no jurisdiction to hear and determine this cause, or to grant any relief therein whatsoever, for the reason that
50 said suit is in effect a suit against the State of Missouri within the meaning of the Eleventh Article of Amendment to the Constitution of the United States.

Fourth. It appears upon the face of complainant's bill of complaint, that complainant is a railroad company organized under the laws of the States of Illinois and Iowa, and that it has since the year 1875, and prior to the year 1907, consolidated by purchase, or otherwise, with a railroad company organized under the laws of the State of Missouri, and that by virtue of said consolidation it has secured all or a part of the lines of railroad in the State of Missouri, now owned and operated by said complainant, and that, therefore, said complainant was not entitled, under the provisions of Section 18 and Section 21 of Article XII, of the Constitution of Missouri, and Section 1060 of Chapter 12, Article II, Revised Statutes of Missouri, 1899, to remove any suit instituted against it in the courts of Missouri to the Federal Courts, but that said complainant became and remained, by virtue of said consolidation and the Constitution and statutes of the State of Missouri, subject to the jurisdiction of the courts of Missouri as if said corporation has been organized under the laws of the State of Missouri.

Wherefore, and for divers other good causes of demurrer appearing in the complainant's bill of complaint, defendants demur thereto and demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill of complaint, and pray to be hence dismissed with the costs and charges in this behalf most wrongfully sustained.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendants.

51 Personally appeared before me, the undersigned, a Notary Public, John E. Swanger, Secretary of State of the State of Missouri, defendants in the above entitled cause, and says that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

JOHN E. SWANGER.

Subscribed and sworn to before me this 30th day of January A. D., 1908.

[SEAL.]

THOMAS S. REED,
Notary Public.

My term expires March 7th, 1909.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendant.

And afterwards, to-wit, on the 31st day of January, 1908, the above cause coming on to be heard before the Honorable Smith McPherson, the following Opinion was handed down by the Court:

52 And on the same day the Court handed down an opinion in said cause in words and figures, to-wit:

In the Circuit Court of the United States, Western District of Missouri.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Complainant,
vs.
JOHN E. SWANGER, Secretary of State and Others, Defendants.

M. A. Low and Paul E. Walker, for Complainants.
Herbert S. Hadley, Attorney General, and John Kennish, Assistant Attorney General, for Defendant.

And six other like cases against the same defendant.
The same appearance for the defendant.
Thomas R. Morrow for the Atchison, Topeka & Santa Fe R. R. Co.
Frank Sebree and W. F. Evans for the St. L. K. C. & C. Ry. Co.
Frank Hagerman for the Chicago, Milwaukee & St. Paul Ry. Co.
E. L. Scarritt, W. C. Scarritt, E. H. Jones and C. M. Miller for the Chicago and Alton Railway Company.
O. H. Dean, W. D. McLeod, H. C. Timmonds, and O. M. Spencer for the Chicago, Burlington & Quincy Ry. Co.
Frank Hagerman and Kimbrough Stone for C. & G. W. Ry. Co.

Opinion.

SMITH MCPHERSON, *Judge:*

All these cases present the same question, and are alike in fact, except with reference to one company which came in the state after 1901, a matter not controlling the decision herein.

53 Subject to that statement, all the companies, either by purchase or construction, between the years 1870 and 1891, became the owners of a line of railroad into and across the state, at an expenditure of many millions of dollars, doing both a state and interstate business.

By an Act of the Legislature of the year 1870, it was provided that

two or more roads could consolidate, and authorized a road of an adjoining state to build a line into the state, or to buy one already constructed, and thereby form a continuous line. The statute further provided that such non-resident corporation "shall be subject "to all regulations and provisions of law governing railroads in this "state. And may sue and be sued, in all cases, and for the same "causes, and in the same manner as a corporation of the state might "be sued."

The non-resident corporation in all respects was given the same powers and was made subject to the same burdens, as a resident corporation.

In 1891 the Legislature enacted, that any corporation for pecuniary profit, created under the laws of another state, shall, before allowed to continue in business, file with the Secretary of State a copy of its Articles of Incorporation, and a statement as to its stock, and other matters, pay for and receive a certificate from the Secretary of State, showing that it has the right to do business.

The bill of complaint herein attacks the validity of an Act of the Legislature of 1907.

Section One (1) provides that if any railway corporation created and existing under the laws of any other state, and doing a railway business from one point in this state to another point within this state, shall without the written consent of the other party remove a case from the State court to an United States Court, or shall without said written consent institute any suit against a citizen of the state, in any Federal Court, then the Secretary of State shall revoke the license to do business from one point within the state to any other point within the state, both as to passengers and freight. And doing such business shall subject it to a penalty of not less than two
54 thousand, and not more than ten thousand dollars for each offense, which disability shall continue for five years.

It is alleged that complainant is about removing a case, and the Secretary will follow that by revoking its right to do business. The defendant contends that this in effect is an action against the state, in violation of the Eleventh Amendment to the Constitution. The complainant contends that the Act of 1907 impairs its contract with the state, and denies it the equal protection of the laws if enforced, and is in contravention of the United States Judiciary Statutes.

This court is mindful of the criticism by many laymen, as well as by some lawyers, to the effect that United States Courts have no right, nor even the power, to decree the invalidity of State statutes. The argument, or, rather, the talk is, that the people know what they need, and that their representatives in Legislature assembled alone should determine what statutes we must have. And when so determined and evidenced by legislative enactment, that the courts should not interfere by decree, and thereby thwart the legislative will. In other words, Great Britain has the model government.

This is a most attractive and persuasive argument to many, and has been from the organization of our government. It was the keynote to the Kentucky and Virginia Resolutions. The *all* power of the state as against the Nation, was the argument of the minority

in the Convention of 1787, and in the Convention of the States called to ratify that work. Webster in his second reply to Hayne, defining it, said:

"I understand the honorable gentleman from South Carolina to "maintain that it is a right of the State legislature to interfere "whenever in their judgment, this government transcends its consti- "tutional limits", and to arrest the operation of its laws.

"I understand him to maintain an authority, on the part of the "States, thus to interfere, for the purpose of correcting the exer- "cise of power by the general government, or checking it, and com- "pelling it to conform to their opinion of the extent of its powers.

"I understand him to insist, that, if the exigency of the case in "the opinion of any State government, requires it, such State Gov- "ernment may, by its own sovereign authority, annul an act of the "general government which it deems plainly and palpably uncon- "stitutional.

"This is the sum of what I understand from him to be the South "Carolina doctrine, and the doctrine which he maintains."

55 Seldom does a Court—and particularly an United States Court— hold a State enactment void, but that the old argument and criticism are made, charging the Courts with usurpation.

And this is not confined to laymen. Lawyers indulge in that kind of talk. An issue of a leading newspaper, recently reporting a con-tion of Attorneys General, is the authority for the statement that the point to an address of one member from a State East of the Mississippi River, was, that the Fourteenth Amendment is a work of great iniquity, in that it limits the power of the States; that the Amendment was adopted for the Negro only.

And the so called argument is not made by laymen and lawyers only. There recently appeared from the pen of the Chief Justice of one of the Original Thirteen States, an article denunciatory of the practice of United States Courts decreeing statutes void as being in conflict with the Constitution. He is an accomplished lecturer and a writer of fine diction, but he is pressing views with reference to the Constitution wholly at war with the generally prevailing view of lawyers, jurists and statesmen. Admitting that the doctrine is now well established, he declares it to be an evil to allow or tolerate United States Courts holding State statutes void because of a conflict with the Constitution. He builds an argument on an alleged statement of fact, which statement is not a fact, that it was proposed in the Convention of 1787,

"that the Judge should pass upon the constitutionality of the Acts "of Congress. This was June 5th, receiving the votes of only two "of the States."

As a statement of history, no greater error can be found in print. The scheme before the Convention was to have a Council of Revision composed of the Executive and of Justices of the Supreme Court. In other words, Judges should have, with the President, the veto power. That was voted down.

His second statement is, that Mercer reflected the views of a majority of the Convention when he said,

" that he disapproved of the doctrine that the Judges, as expositors
" of the Constitution, should have authority to declare a law void.
" He thought that laws ought to be well and cautiously made, and
" then be incontrovertible."

56 No doubt Mercer said that, but he did not reflect the views of a majority. Mercer was a delegate from Maryland, and had so little heart in the work, that he did not appear in the Convention until in point of time the Convention was nearly half over. But he appeared in time to oppose the great principles of our government. When the Convention was about adjourning, Dr. Franklin, too feeble to talk, gave a paper to James Wilson to read, urging that all objections be put to one side, and begging that every member sign the great instrument. Mercer was not persuaded, and refused to sign. On the same day it was proposed to place the journals in the hands of the President, (General Washington,) to the end that they might be preserved; and Mercer voted *No.* The Convention having adjourned, Mercer was elected as a delegate to the Maryland Convention called to ratify or reject the Constitution and with a small minority voted against the ratification of the Constitution. Bancroft recites in his history, that Washington wrote to Madison as to the efforts made in the Maryland Convention to reject the Constitution:

"Chase once more made a display of all his eloquence:—John F.
" Mercer discharged his whole artillery of inflammable matter; and
" Martin rioted in boisterous language. But no converts were made:
" no, not one."

All should decline to follow the teaching of Mercer in constitutional law.

In contrast with that, it is delightfully refreshing to read from the address of the venerable jurist, Justice Harlan, delivered but a few weeks since, in upholding the powers of both the states and the nation, insisting that each shall keep within their own limits, to the end that this government may continue to exist; that the states may manage and control all local affairs, but they shall not control commerce between the states, nor impair contracts, nor do many other things prohibited; and that this government may not become as it was under the Articles of Confederation. He said:

"What, let me ask, are some of the grounds upon which the pessi-
" mist of these days bases his fears for the safety of our institutions?
" He persuades himself to believe that the trend in public affairs
" today is toward the centralization of all governmental power in the
" nation, and the destruction of the rights of the States. If this were
" really the case, the duty of every American would be to resist such
" a tendency by every means in his power. A national government
" for national affairs, and State government for State affairs, is the
" foundation rock upon which our institutions rest. Any

57 " serious departure from that principle would bring disaster
" upon the American people and upon the American system
" of free government. But the fact is not as the pessimist alleges it
" to be. The American people are more determined than at any
" time in their history to maintain both national and State rights,
" as those rights exist under the Union ordained by the Constitution.

"* * * The best friends of State rights, permit me to say, are "not those who habitually denounce as illegal everything done by "*by* the General Government, but those who recognize the Govern- "ment of the union as possessing all the power granted to it in the "Constitution, either expressly or by necessary implication; for, with "out a General Government possessing controlling power in relation "to matters of national concern, the States would have no prestige "before the world, and would be in perpetual conflict with one "another. With equal truth, it may be said, that the best friends "of the Union are those who hold that the States possess all govern- "mental powers not granted to the General Government, and that "are not inconsistent with their own Constitution, or with the Con- "stitution of the United States, or with a republican form of gov- "ernment."

The National and State Governments do not conflict. The one or the other has the power to confer all rights needed, and to remedy all wrongs, and to say that neither has such power, is to assail our form of government.

James Wilson in a letter to Washington presented the entire case when he wrote:

"Neither *vacancies* nor *interferences* will be found between the "limits of the two jurisdictions which together compose, or ought "to compose, only *one* comprehensive system of government and "laws."

The views of Justice Harlan and of James Wilson are those entertained by this court.

There is a prevalent notion that United States Courts only declare State statutes void, as being in conflict with the National Constitution. All informed men know that the State courts so hold for one, as well as an additional reason, because by Article VI of the National Constitution it is provided:

"All executive and judicial officers, both of the United States and "of the several states, shall be bound by Oath or Affirmation to "support this Constitution."

So that it necessarily follows, that State courts, when so persuaded, will not only declare State statutes void when in conflict with the State Constitution, but State courts will declare Statutes of Congress void when in conflict with the National Constitution. And when all who appreciate our form of government under its written Constitution, knowing that the general government is one of limited powers, but supreme wherein empowered to act, endorse the right, power,
58 and the duty from which there can be no escape, of all courts to pass upon the validity or invalidity of Congressional enactments. State judges take an oath to support the Constitution of the United States, but they do not take an oath to support all Congressional enactments. That such has been the practice, one need but look at the state decisions. For a partial list of such cases, see:

Moore vs. Clymer, 12 Mo. App. 11.
Clark vs. Mitchell, 64 Mo. 564.
King vs. Insurance Co., 195 Mo. 290 (92 S. W. Rep. 892).
Latham vs. Smith, 45 Ill. 29.

Craig vs. Dimock, 47 Ill. 308.
Bunker vs. Green, 48 Ill. 243.
Express Co. vs. Haines, 48 Ill. 248.
Wilson vs. McKenna, 52 Ill. 43.
Griffin vs. Ranney, 35 Conn. 239.
Moore vs. Quirk, 105 Mass. 49.
Clemens vs. Conrad, 19 Mich. 170.
Bumpass vs. Taggart, 26 Ark. 398.
Wallace vs. Cravens, 34 Ind. 534.
Moore vs. Moore, 47 N. Y. 467.
Davis vs. Richardson, 45 Miss. 499.
Griswold vs. Hepburn, 63 Ky. 20.
Ruffin vs. Board, 69 North Carolina, 498, 510.

It will be observed that three of these are Missouri cases.

The different holdings were made by the State courts because all State judges, as well as United States judges, are required by Article VI of the Constitution to take an oath to support the Constitution of the United States, and by reason of that other provision of the same Article, which provides:

"This Constitution, and the Laws of the United States which shall " be made in pursuance thereof * * * shall be the *the* supreme law " of the land; and the judges in every state shall be bound thereby, " anything in the Constitution *of* laws of any state to the contrary " notwithstanding."

And these different state courts as in duty bound gave their respective judgments as to whether Congressional enactments were in conflict with the Constitution; and finding the conflict to exist; upheld the Constitution and decreed the statutes void. And in one case at least—that of Griswold vs. Hepburn—the judgment of the Court of Appeals of Kentucky was affirmed by the Supreme Court of the United States. And such holdings should not be otherwise, because, first of all, the Constitution is the supreme law of the land and next to that are the enactments of Congress, *provided*
59 *always* such enactments are "pursuant" to the Constitution.

The most attractive argument to some lawyers of recent days, is that the State courts alone in the first instance should pass upon the question as to the validity of State statutes, with the right of the defeated party to carry the case for final decree to the Supreme Court of the United States. Such arguments are plausible, are convincing to many good people, but are so dangerous as to amount to a heresy. It is the extreme of "State Rights" in a new form. The argument is plausible, because they admit that the final decision should be made by the United States Supreme Court upholding the National Constitution, and overthrowing state legislation, when the two are in conflict. So they argue that the State courts should first pass upon the case, and if the statute is upheld, the party defeated can have a remedy by writ of error, carrying the case to the National Supreme Court.

A writ of error is for the correction of erroneous rulings in mat-

ters of law, and not for a review of questions of fact. And it can be safely predicted, that in all cases, including those in equity, taken up by writ of error, that the contention will be that all questions of fact will be foreclosed. Such is the rule, and a writ of error in a case turning on questions of fact, concerning which the evidence is in conflict, will be no remedy at all.

And the question naturally arises whether such will be the result. If so, then the Supreme Court is practically deprived of power in all such cases, with the result that the conflicting state court decisions will remain in force, instead of having that which is so desirable, viz: a decision by the National Supreme Court on all National questions. The real welfare of this country demands that *all* questions, fact as well as of law, pertaining to our National Constitution be ultimately decided by our National Supreme Court, to which all patriotic citizens should and do yield the most cheerful obedience. That a writ of error to a State court in a chancery, as well as in a law case
60 in which the evidence is in conflict, will avail nothing, one need but read the case of Egan, vs. Hart, 165 U. S. 188. And see Bement vs. National Co., 186 U. S. 70 *83*.

The only remedy to correct the decision of the highest court of the state is by writ of error, in chancery cases as well as in actions at law. In a large per cent of these chancery cases the case turns solely on questions of fact, with reference to which the evidence is in conflict. And an important inquiry is thereby suggested, as to whether if the effort is successfully made to keep litigation involving Federal questions in the State courts, depriving the National courts from passing on questions of fact in chancery cases, as to whether such party thus desiring a review is not deprived of due process of law. This is a question of great moment, but not now for discussion in this case.

It is often urged that cases in the United States Courts are too tedious and that too much time is taken to obtain a final decision. This is an error. Under the equity rules, if either party desires the case be expedited, it can be carried to final decision as quickly or more so, than in most of the State courts.

It is due to counsel for defendant to say that several of the foregoing propositions were not controverted by them in argument. But it has been deemed proper by the court on its own motion to briefly discuss them.

I now turn to the questions presented by the bill of complaint. It is contended that this action, although against a State officer, is in effect a suit against the State of Missouri. The Eleventh Amendment to the Constitution recites:—that

"The judicial power of the United States shall not be construed " to extend to any suit in law or equity, commenced or prosecuted " against one of the United States by citizens of another state, or " by citizens or subjects of any foreign state."

That the Supreme Court has passed upon this many times, is known by all lawyers. But there are no conflicts in the decision, although in some of the cases against State officers, it was held that the actions were in effect suits against the state, and in other cases,

the decisions were, that the State in effect was not being,
61 sued. No one questions the meaning and purpose of the Amendment, and no one is in doubt as to the reason for adopting it. The question in every case is as to the facts of the case, and as to the relief sought. And in each case as it arises, such is the question.

It would be wholly academic to now discuss the question further than to mention the two lines of cases. In Fitts vs. McGhee, 172 U. S. 516, and like cases, the holding is that if penalties, and fines, and costs only are involved, that United States Courts cannot take jurisdiction. In the case of M. K. & T. R. R. Co. vs. The Missouri Commissioners, 183 U. S. 53, construing the Missouri statutes, and like cases, the holding always is, that if in addition to fines, and penalties, property rights are invaded, that an action for relief is not in effect a suit against the state.

Suffice it to say, that the Missouri statutes have been considered and construed by the Supreme Court. Whatever the decisions have been, or may be hereafter from other states, this case is binding on this court sitting in Missouri, construing Missouri statutes, and should be observed until overruled, which is so highly improbable as to merit no consideration. Or, if mistaken in this, when expressly overruled will be the time to further consider this.

By Article III of the Constitution, it is provided, that,

"The judicial power of the United States shall be vested in one " Supreme Court, and in such inferior courts as the Congress may " from time to time ordain and establish."

By section two thereof it is provided:

"The judicial power shall extend to all cases, in law and equity, " arising under this constitution, the laws of the United States, and " to controversies between citizens of different states."

The judiciary act of 1888 covered this with particularity, providing that United States Courts shall have jurisdiction in all cases of a civil nature wherein the amount in controversy shall exceed two thousand dollars, in several classes of cases, two of which only need be stated. The one is, in the language of the Constitution, "in an action between citizens of different states." And as to that, the uniform holding for many years has been, that a corporation shall be regarded as a citizen of the state where incorporated. The other class is, that jurisdiction is conferred, both
62 by the Constitution and the Act of 1888, regardless of citizenship, "in a case arising under either the Federal Constitution, "or the laws of the United States."

So that if the Act of the Missouri Legislature of 1907, hereinbefore referred to, is valid, then no non-resident railway company can have any of its litigation in the United States Courts; but a railway corporation organized under the laws of Missouri can bring its actions in such courts against citizens of Missouri, provided such cases "arise under the Constitution or laws of the United States." And it is said that at least three of the trunk lines of road in the state are Missouri corporations. They can bring their cases of the nature referred to in the United States Courts, but if the

non-resident companies do that, they are not only subjected to heavy penalties, but the penalties if enforced drive them from doing any and all business of a state character. And if the Statute of 1907 is valid, then we have one or two situations presented.

1. The company must cease doing a state business. Passengers from one point to another point within the state, must not be carried. And the same as to freight. Regardless of the fact that local aid may have been voted and donations made for the building of the road, the people along the line can longer have no road except for interstate and through business with other states, and the contract by the road with the state to perpetually maintain and operate its road is at an end.

2. Or, the company must surrender its rights under the Constitution and the Statutes of Congress, giving the right to have some of their litigations in the United States Courts.

There is no escape from the one conclusion or the other. And this presents an important question for decision. The Missouri statute does not provide that the litigation of non-resident railway corporations shall not be had in United States Courts, but provides that if carried there that its rights of doing business shall cease for five years.

63 An analysis of a few of the decisions of the Supreme Court will lead to the conclusion about which there can be no doubt.

In Doyl vs. Insurance Co., 94 U. S. 535, there was under consideration a statute of Wisconsin which provided that if any foreign insurance company removed any case to an United States Court, that its right to do business in the state should cease. A case having been removed, the company sought to enjoin the revocation of its license, and from being ousted from the state. The Supreme Court held the statute to be valid and enforceable. The recent case of Prewitt vs. Insurance Co., 202 U. S. 246, construing a Kentucky statute, is to the same effect. There are many other decisions of like holdings by judges on the Circuit, which will not be reviewed.

But from these two decisions, and the one so recent, it can be stated that the undoubted rule is, that a foreign corporation can be kept out or excluded when once in, by any state, and this with or without good reason, and for no reason at all. Such is the general rule, but to which there are exceptions, presently to be noticed.

In the two cases cited the company had no property in the state, and had made no investments, but had a license to do an insurance business. It is true the company had advertised its business, established agencies, and incurred expenses of those kinds. So that as to a foreign insurance company, it is wholly immaterial for what reason the state does not desire it to continue in business. It can be excluded, and the company can have no relief.

The state officers insist that the two cases cited, and those of like holdings, demand at the hands of this Court a decree upholding the validity of the Missouri statute in question.

The concluding paragraph of the majority opinion of the Doyle

case will arrest the attention of anyone investigating the question in all its phases. It was said:

"No right of the complainant under the laws of the Constitution of the United States, by its exclusion from the state is infringed; and this is what the state now accomplishes. There is nothing therefore, that will justify the interference of this court."

Whether a state can prevent a foreign corporation engaged in interstate commerce from coming in the state, will not be here discussed. An insurance company is not engaged in com-
64 merce, and therefore that question was not covered in the cases cited.

In the cases at bar a license to do business is not the question. Each of the companies invested millions of dollars, and it is now in the state and cannot remove. To prevent it from doing business, means appropriating its property, or destroying it, without making any compensation therefor. It was invited to come into the state, and was told by the laws then in force, that it would have the same and like standing as resident companies, with benefits as great, and with burdens no greater. After these investments had been made, and which cannot be withdrawn, it is declared by legislation, that no kind of litigation shall be carried on by it in any court other than the State courts, but leaving to the railway corporation organized under the laws of the state, to go to the National Courts with its litigation of all kinds arising under the laws or Constitution of the United States. The State corporation, organized under its laws, may sue or be sued in any court, State or National, if there is a federal question, but a foreign corporation doing business as a competitor must at all times be subject to the State courts; or if it ventures into a National Court, then all investors lose all.

The case of Barron vs. Burnside, 121 U. S. 186, arose under an Iowa statute much like, and in principle the same as the Missouri statute now being considered. The Supreme Court held the statute to be void. The Iowa statute required a foreign corporation desiring to do, or continue in business in Iowa, should file with the Secretary of State a resolution designating a person upon whom service should be made, whereupon a permit to do business should be issued. It was further provided, that if any non-resident company should remove a case to the United States Court on the ground of diverse citizenship, that such permit should be vacated, and not again given a permit for three months, and in the meantime doing business should subject it to large penalties. The decision holding the statute void was by an unanimous court.

And the statute was declared void in the following language,
65 not capable of being misunderstood by anyone:

"As the Iowa statute makes the right to a permit dependent "upon the surrender by the foreign corporation of a privilege se- "cured to it by the Constitution and laws of the United States, the "statute requiring the permit must be held to be void."

And the privilege secured to it, which the court was discussing was the privilege of having its litigation in United States Courts.

It will be observed that this decision was long after the Doyle

case, and by express mention, it was held that the Doyle case did not control.

On the foregoing, the case at bar could be safely grounded, but for another reason the statute is void, as being in conflict with the National Constitution, in that it is repugnant to the provision which reads, "No state shall pass any law impairing the obligation of contracts."

It is stoutly denied that there is any contract, and of course there must be a contract before the obligation of one can be impaired.

What was the contract? The state gave it the power of eminent domain. In many instances it gave it pecuniary aid. It gave it the rights of a common carrier. It gave it the right to charge reasonable prices for its services. It promised it the equal protection of the laws as to taxation, and equal protection with others, against all who might seek to injure its property or earning power. The state in effect said, "Make your investments, and we will give you these rights." The company accepted the offer and made the investments, and now cannot remove if it so desired, because it has a contract in perpetuity to serve the people as a common carrier, and to give efficient service for reasonable remuneration. That there is a contract, is easily discerned.

And that being so, the most recent case of all, that of the American Smelting Company vs. Colorado, 204 U. S. 103, is decisive of this phase of the case. Colorado enacted a statute that foreign corporations entering the state should be on an equality with home corporations. While such legislation was in force, the complainant entered the state and made large investments to carry on its
66 business within the state. The Supreme Court of the United States decided that that was a contract between the corporation and the state. After such investments had been made, the state by legislation attempted to require the foreign corporation to pay more taxes than could be exacted from resident corporations, ignoring its promise by legislation in force when the non-resident corporation went into the state, that the taxes should be equal. The Supreme Court decided that the state was thereby impairing its contract.

From the foregoing the opinion of this Court is as follows:

1. The Doyle and Prewitt cases do not have the slightest application to the case at bar. In those cases property rights were not involved. The mere naked right to a license to do business by a foreign corporation was considered.

2. The Missouri Statute of 1907 is void, because it allows a resident company to sue in the federal court, if there is a federal question, and denies that right to a non-resident company.

3. Regardless of the last preceding statement, the statute is void because it seeks to take from the complainant its right to bring or remove a case to the United States Court, which right is given by the Constitution, and the Acts of Congress, which by Article VI of the Constitution is declared to be "The Supreme Law of the Land, anything "in the Constitution or laws of any state to the contrary notwithstanding."

4. The statute is void, because it is an effort to impair, and to

repudiate the contract of the state made with the company, by which it was induced to come into the state, making investments in large sums, and was authorized to do a state business, but now declaring that it shall not do such business, thereby rendering it insolvent, and taking from the people along its line the use of a railway for state business, unless the company will surrender under coercion rights given it by the National Constitution and valid enactments of Congress.

This court recognizes the rule, that presumptively all legislation is valid. But it is only a presumption, and in no sense conclusive.

66*b* This court recognizes that all doubts should be solved in favor of upholding legislation. But there are no doubts in this case.

This court recognizes that the Secretary of State will be enjoined from doing that which he is commanded to do by state legislation. But it is also well known, that if this court is in error, that there can be a reversal by the Supreme Court within less than a year of time.

There is but a single question presented. The complainant asserts rights under the National Constitution and laws enacted by Congress. The defendant asserts rights under an Act of the Missouri Legislature, and insists that there is no conflict.

This court holds that there is a conflict. And there being a conflict, the one or the other must give way. And the Constitution and Laws of Congress "being the Supreme Law of the Land" as of course the enactments of the State must yield.

The defendant's demurrer to the bill of complaint is overruled, and as he declines to plead further, a final decree will be entered as prayed, perpetually enjoining him and his successors from attempting to give force to the Missouri Statute which seeks to prohibit the Railway Company from doing business within the state, if it seeks to have any of its litigation in the United States Courts.

Kansas City, Missouri, January 31, 1908.

67 And afterwards, to-wit on the same date, the above cause coming on to be heard, the following decree was made and entered of record, to-wit:

In the Circuit Court of the United States for the St. Joseph Division of the Western District of Missouri.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

Decree.

This cause coming on to be heard upon the 31st day of January, 1908, being on one of the days of the October Term, 1907, of this Court, and the application for a temporary injunction is granted and defendants excepted at the time, and the cause being taken up upon the bill of complaint in said cause, and the demurrer filed by the defendants thereto, and the cause by agreement of the parties hereto, being submitted to the court, and the court being fully advised in the premises,

It is hereby ordered, adjudged and decreed by the court that the demurrer to the said bill of complaint be overruled, to which ruling the defendants duly excepted at the time; and thereupon the defendants having elected to stand on their said demurrer, and declinging to further plead to said bill of complaint; the cause is submitted to the court upon said bill of complaint; thereupon, the court having considered the same, finds all of the material allegations in the
68 said bill of complaint to be true, and that the equity of said cause is with the complainant, and that the Act of the General Assembly of the State of Missouri, approved March 13th, 1907, hereinafter referred to is unconstitutional and void, and that the Act of the General Assembly of the State of Missouri, approved March 19, 1907, hereinafter referred to is void and inapplicable and unenforcible against complainant so far as it relates to the stopping of the trains operated by the complainant at the station of Lathrop, in Clinton County, Missouri, and so far as the penalties of forfeitures, or the enforcement or recovery of the penalties or forfeitures prescribed in said act, are concerned; and that the complainant is entitled to the relief prayed for in the said bill of complaint.

It is therefore ordered, adjudged and decreed by the Court that the Act of the General Assembly of the State of Missouri, referred to and set forth in said bill of complaint, entitled

"An Act to provide for the revoking of the license, right and authority of any foreign or non-resident railway corporation, of whatever kind, to do business from a point in this state to a point in this state, whenever such corporation shall remove certain suits or proceedings to any federal court or bring certain suits or proceedings in any federal court; to provide a penalty on any such corporation

for doing, attempting to do, or holding itself out to do business from a point in this state to a point within this state, without a license, permit or certificate of authority therefor first had and obtained, or to do such business after its license, permit or certificate of authority has been revoked, and to prevent any such corporation from doing or attempting to do business from a point in this state to a point in this state, without first having obtained a license, permit or certificate of authority therefor," approved March 13, 1907, be and the same is decreed and adjudged unconstitutional, void and unenforcible against, and in no way binding upon, the complainant herein, and that the defendant, John E. Swanger, Secretary of State of the State of Missouri, his deputies, agents assistants and
69 successors in the said office of the Secretary of State of the State of Missouri, be and each and all of them are hereby restrained and perpetually enjoined from enforcing or attempting to enforce the provisions of said Act of the General Assembly of the State of Missouri against the complainant herein:—and are hereby perpetually enjoined from revoking or cancelling or in any way attempting to revoke or cancel the license, permit or certificate of authority issued by the State of Missouri, or any of its authorized officers, to the complainant to do or perform its business in the State of Missouri, because or by reason of the removal or attempt to remove, on the part of the complainant, any suit or proceeding from any state court to any Federal or United States Court, or because or by reason of the institution on the part of the complainant of any suit in any Federal or United States Court, or because or by reason of the institution on the part of the complainant of any suit, in any Federal or United States Court against any citizen of the State of Missouri; and are perpetually enjoined from in any manner attempting to enforce or carry out any of the provisions of the said Act of the General Assembly of the State of Missouri, as against complainant.

It is further ordered, adjudged and decreed by the court that the Act of the General Assembly of the State of Missouri, referred to in the said bill of complaint and entitled,

"An act to repeal section 1075 of article 2, chapter 12, of the Revised Statutes of Missouri, 1899, relating to "Railroad companies," as amended by the session acts of 1905, at pages 107 and 108, approved April 17, 1905, and to enact a new section in lieu thereof, to be known as section 1075, and relating to railroad companies, with an emergency clause,"

approved March 19, 1907, be and the same is decreed and adjudged void and inapplicable and unenforcible as against the complainant so far as it relates to the complainant's trains passing through
70 the city of Lathrop, in the County of Clinton, of the State of Missouri, or the stopping of such trains at the station of said Lathrop, are concerned, and so far as the penalties or forfeitures provided in said Act are concerned, and the enforcement or recovery of such penalties or forfeitures are concerned, and in no way binding upon the complainant herein; and that the defendant Harry T. Herndon, Prosecuting Attorney of Clinton County, in the State of

Missouri, his deputies, assistants, agents employees and successors in said office be and they are hereby enjoined from enforcing or attempting to enforce against complainant the provisions of the said Act, approved March 19th, 1907, so far as it relates to the stopping or failure to stop trains operated by the Complainant, at the said station of Lathrop, Clinton County, Missouri; and from enforcing or attempting to enforce against complainant any of the penalties or forfeitures provided for in said Act for a failure to observe the provisions thereof, and from prosecuting, or attempting to prosecute the complainant, its officers, agents or servants, in any manner whatsoever for a failure to observe the provisions of said Act above referred to and from acting, or attempting to act under or by virtue of any of the powers or rights attempted to be conferred by said statute as above specified, in so far as said Act relates to the said trains of complainant or the said penalties or forfeitures.

And it is further ordered, adjudged and decreed by the court that the complainant herein have and recover of and from the defendants its costs herein expended and have thereof execution.

January 31, 1908.

SMITH McPHERSON, *Judge.*

71 And afterwards to-wit, on the said 31st day of January, 1908, the defendant herein filed with the court a petition for appeal, which is hereto attached.

72 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

Petition for Order Allowing Appeal.

The above named defendants conceiving themselves aggrieved by the decree made and entered on the 31st day of January, 1908, in the above entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 31st day of January, A. D. 1908.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendant-.

[Endorsed:] No. 413. In Equity. The Chicago, Rock Island & Pacific Railway Company, Complainant, vs. Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants. Petition for Appeal. Filed January 31st, 1908. Calvin C. Colt, Clerk U. S. Circ. Court. Herbert S. Hadley, Att'y Gen'l; John Kennish, Ass't Att'y Gen'l, Att'ys for Defendants.

73 And afterwards, to-wit, on the 31st day of January, 1908, the — made an Order granting an appeal, which said order is hereto attached.

74 In the Circuit Court of the United States, Western District of Missouri.

No. 413. Equity.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Plaintiff,

vs.

JOHN E. SWANGER, Secretary of State of the State of Missouri, and Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, Defendants.

Order.

Now on this January 31, 1908, after the order for a temporary injunction was made herein and after the final decree was ordered of record and in open court, come the defendants and prays an appeal to the United States Supreme Court, which appeal is granted and the assignment of errors ordered filed. And an appeal bond is presented and is filed and is approved, but which bond will not serve the office of a supersedeas. A citation is signed by the presiding judge and service thereof accepted by counsel for complainants, and said citation is filed.

SMITH McPHERSON, *Judge.*

[Endorsed:] 413. The C., R. I. & Pac. Ry. Co. vs. Jno. E. Swanger, Sec't'y of State et al. Order. Filed January 31st, 1908. Calvin C. Colt, Clerk U. S. Circ. Court.

75 And afterwards to-wit, on the said 31st day of January, 1908, the defendants herein filed in said court their Assignment of Errors and a Citation, both of which papers are hereto attached, and in words and figures as follows:

76 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri; JOHN E. SWANGER, Secretary of State of the State of Missouri, Defendants.

Assignment of Errors.

The defendants pray an appeal from the final decree of this Court to the Supreme Court of the United States and assign for error:

1st. That the court erred in overruling the demurrer to the bill.

2nd. The court erred in granting an injunction against the defendant-, as prayed in the bill.

3rd. The court erred in decreeing the Act of the Legislature of the State of Missouri, approved March 13, 1907, and the act of the legislature of the State of Missouri, approved March 19" 1907 and set out at length in complainant's bill, unconstitutional and void.

4th. The court erred in granting the temporary injunction against defendant-.

5th. The court erred in granting a permanent injunction against defendant-.

HERBERT S. HADLEY,
Attorney General of the State of Missouri,
Counsel for Defendants.

76½ [Endorsed:] No. 413. In Equity. The Chicago, Rock Island and Pacific Railway Company, Plaintiff, vs. Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendant-. Assignment of Errors. Filed January 31st, 1908. Calvin C. Colt, Clerk U. S. Circ. Court. Herbert S. Hadley, Att'y Gen.; John Kennish, Ass't Att'y Gen., Att'ys for Defendant-.

77 In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY CO., Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendants.

UNITED STATES OF AMERICA, *ss:*

Citation on Appeal.

To The Chicago, Rock Island and Pacific Railway Company and M. A. Low and Paul E. Walker, its Attorneys:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington in the District of Columbia, on the 2nd day of March, A. D. 1908, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the Circuit Court of the United States for the Western Division of the Western District of Missouri, from a final decree signed, filed and entered on the 31" day of January, 1908, in that certain suit, being in equity No. 413, wherein you are the complainant and appellee and John E. Swanger, Secretary of State of the State of Missouri, is defendant and appellant, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

78 Witness the Honorable Smith McPherson, United States District Judge for the Southern District of Iowa, presiding in the Circuit Court of the Eighth Judicial Circuit, this 31st day of January, 1908, and of the Independence of the United States the One Hundred*th* and Thirty Second.

SMITH McPHERSON,
United States Judge, Presiding in the Circuit Court.

Service of a copy of the within citation is hereby acknowledged this 31st day of January 1908.

M. A. LOW AND
PAUL E. WALKER,
Solicitors for Complainant.

78½ [Endorsed:] No. 413. In Equity. The Chicago, Rock Island and Pacific Railway Company, Plaintiff, vs. Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendant-. Citation on Appeal. Filed January 31st 1908. Calvin C. Colt, Clerk U. S. Cir. Court.

79 And afterwards to-wit, on the said 31st day of January, 1908, the defendants herein filed with the Court *is* Bond for appeal, which said bond was approved by the Court, and is in words and figures as follows:

80 In the Circuit Court of the United States for the Western District of Missouri, St. Joseph Division.

In Equity. No. 413.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Complainant,

vs.

HARRY T. HERNDON, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, Defendant-.

Bond of Appeal.

Know all men by these presents, that we, Harry T. Herndon, John E. Swanger, Secretary of State of the State of Missouri, and —— —— and —— ——, his sureties, are held and firmly bound unto The Chicago, Rock Island & Pacific Ry. Co. in the full and just sum of Twenty-five dollars ($25.00), to be paid to the said The Chicago, Rock Island & Pacific Ry. Co., *his* certain attorneys, executors administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of January, A. D. in the year of our Lord one thousand nine hundred and eight.

Whereas, lately at the Circuit Court *for the 31st day of January 1908,* in a suit pending in said Court between The Chicago, Rock Island & Pacific Ry. Co., Complainant, and John E. Swanger, Secretary of State of the State of Missouri, defendant, a decree was rendered against the said John E. Swanger and the said John E. Swanger having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Chicago, Rock

81 Island & Pacific Ry. Co., its attorneys, citing and admonishing them to be and appear at the session of the Supreme Court of the United States to be holden at the City of Washington, on the — day of —— next,

Now, the condition of the above obligation is such that if the said John E. Swanger shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

JOHN E. SWANGER. [SEAL.]
——— ———. [SEAL.]
——— ———. [SEAL.]

Approved.

SMITH McPHERSON,
District Judge of the Southern District of Iowa, Presiding in the Circuit Court of the Eighth Judicial Circuit.

UNITED STATES OF AMERICA,
Western District of Missouri, sct:

I, Calvin C. Colt, Clerk of the Circuit Court of the United States for the Saint Joseph Division of the Western District of Missouri, hereby certify that the above and foregoing is a full, true and complete transcript of the record, evidence, assignment of errors and all papers and proceedings in the cause above entitled, as fully as the same remain on file and of record in my office. I further certify that the petition for Order allowing appeal, Writ of error, the Citation and a true copy of the Appeal Bond for a writ of error, filed in said cause, are also herewith returned.

In Witness Whereof, I have this 21st day of February, 1908, set my hand as Clerk, and affixed the seal of said Court, at office in the City of St. Joseph, Missouri.

[Seal U. S. Circuit Court, St. Joseph Div., Western Dist. Mo.]

CALVIN C. COLT, *Clerk.*

Endorsed on cover: File No. 21,155. W. Missouri C. C. U. S. Term No. 150. Harry T. Herndon, prosecuting attorney of Clinton county, Missouri, and John E. Swanger, secretary of state of the State of Missouri, appellants, vs. The Chicago, Rock Island & Pacific Railway Company. Filed April 30th, 1908. File No. 21,155.

PPELLANTS

BRIEF

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 150.

HARRY T. HERNDON, PROSECUTING ATTORNEY OF CLINTON COUNTY, MISSOURI, AND JOHN E. SWANGER, (SUCCEEDED BY CORNELIUS ROACH), SECRETARY OF STATE OF THE STATE OF MISSOURI, *Appellants*,

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

This is an appeal by Harry T. Herndon, prosecuting attorney of Clinton county, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, from a final decree

of the Circuit Court of the United States for the Western District of Missouri, entered on January 31st, 1908, declaring certain acts of the Missouri Legislature to be unconstitutional and void and perpetually enjoining and restraining Herndon, in his official capacity as prosecuting attorney, from enforcing the act of the Missouri Legislature (See page 51, Appendix), relating to stopping passenger trains at railroad crossings and intersections, and perpetually enjoining and restraining Swanger in his official capacity as Secretary of State, and his successors in office, from enforcing against appellee the provisions of an act of the Missouri Legislature, approved March 13, 1907 (See page 53, Appendix), relating to the revocation of the license of foreign railroad corporations to do business in Missouri.

The suit was begun by the filing of a bill of complaint (Rec. pp. 1-28) in the circuit court of the United States for the Western District of Missouri, September 7, 1907.

The bill alleges that appellee, The Chicago, Rock Island and Pacific Railway Company, is a railway corporation organized under the laws of Illinois and Iowa, and licensed to do business in Missouri under the laws of that State; that it is engaged in interstate commerce, operating lines of railway in some thirteen different states.

The several lines in Missouri operated by appellee are designated in the bill.

It appears that appellee's main line was constructed in 1871 by the Chicago, Southwestern Railway Company, a company resulting from the consolidation in 1869 of a Missouri with an Iowa corporation.

The bill sets out the acts of the Missouri Legislature of March 2, 1869, and March 24, 1870 (See pages 65, 70, Appendix), relating to the consolidation, etc., of railroads in Missouri (Rec. pp. 3-7).

It is further alleged that the property of the Chicago

Southwestern Railway Company was sold, under foreclosure proceedings, to the Iowa Southern and Missouri Northern R. R. Co., an Iowa corporation organized in 1876, which, in 1880, was consolidated with appellee, then the Chicago, Rock Island and Pacific Railroad Company.

The bill also sets out at length the act of March 26, 1881 (Rec. pp. 9-19).

It is also stated that appellee's Missouri lines form part of its interstate system; that on November 22, 1902, appellee was duly licensed to do business in Missouri, and that the license is still in force.

It is alleged that appellee, by virtue of a trackage contract with the Chicago, Burlington and Quincy Railroad Company, operates trains over the latter's line from Cameron Junction through Lathop to Kansas City, Missouri; that the tracks of the Chicago, Burlington and Quincy Railroad Company intersect the tracks of the Atchison, Topeka and Santa Fe Railway Company at Lathrop, Missouri; that the latter road stops all of its passenger trains at Lathrop; that appellee stops numerous passenger trains at that point, and thereby affords adequate passenger service for that community; that two of appellee's passenger trains do not stop at Lathrop, they being designed and operated mainly to accommodate interstate business and carry the mails from Chicago through Missouri and to points beyond.

It is alleged that "except under unusual circumstances, passengers seldom find it convenient to change from the railway of your orator to that of the Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop."

The bill then alleges that the facilities for the interchange of passengers at Lathrop "are amply sufficient to accommodate the public and that train service at said station is both convenient and satisfactory to the public," that to require its two interstate trains to stop at Lathrop would be an interference with interstate commerce, and that those trains

could not be usefully or profitably maintained if compelled so to stop; that the act of March 19, 1907, so far as it applies to the trains of complainant *which do not stop* at Lathrop, places an unreasonable burden upon the interstate commerce of complainant, is therefore repugnant to the Interstate Commerce Act and the Constitution of the United States, and, consequently, invalid.

The bill further avers that the act of March 19, 1907, was not passed as an exercise of the police power, to secure the safety of the traveling public at junction points, but to provide increased facilities for the interchange of passengers and baggage and to insure more satisfactory service at such points; nevertheless, the bill alleges the installation of a standard inter-locking device at the junction in question, and that such device affords greater security against collisions than does the stopping of trains.

The bill then proceeds to charge that the defendant, Harry T. Herndon, as prosecuting attorney of Clinton county, in which county Lathrop and the crossing and intersection mentioned are located, "has threatened, and still threatens, to prosecute" complainant under the act of March 19, 1907, and "proposes, threatens to and will, unless enjoined, attempt the collection of said penalties of $25.00 per day since July 21, 1907, and under the pain of these accumulating penalties * * * will, unless enjoined, bring suit against" appellee to collect such penalties; that complainant has not stopped its two interstate trains at the station of Lathrop and other similar junctions in Missouri, and could not do so without destroying the profitableness of the service mentioned; that, therefore, the enforcement of the act so as to require the stopping of its interstate trains would take complainant's property without compensation, and deprive it thereof without due process of law.

It is also alleged that the enforcement of the act would delay and obstruct the carriage of the mails.

With respect to the other defendant, John E. Swanger, Secretary of State of Missouri, the bill alleges that he "proposes, threatens to and will, unless enjoined," proceed to revoke, under the act of March 13, 1907, complainant's license to do business in Missouri, and proceed to do all things provided by that act to make such revocation effective, should complainant file in the Federal Court "this bill" of complaint against Herndon and Swanger.

It is alleged its entrance into Missouri and the acquisition of property here, created a contract between appellee and the State, the obligation of which will be impaired by the enforcement of the act of March 13, 1907.

It is further alleged that the act mentioned violates numerous other provisions of the State and Federal Constitutions.

It is also alleged that the penalties prescribed by that act are so harsh as to preclude the litigation of its validity at law.

Stating that complainant is remediless at the common law and can find relief nowhere save in equity, the bill prays that Herndon be restrained from enforcing the act of March 19, 1907, and prays like relief against Swanger, with respect to the act of March 13, 1907, couples therewith a further prayer that both acts be held unconstitutional and null, and for general relief.

A temporary restraining order against both defendants was granted September 6, 1907.

Defendants demurred to the bill (Rec. pp. 33-34), assigning as grounds:

That the facts stated did not entitle appellee to any relief; that there was an adequate remedy at law; that the suit is one against the State, and that the bill shows on its face that appellee is not entitled to remove any suit to a Federal court.

The learned Circuit Judge overruled the demurrer (Op. Rec. pp. 35-46), and rendered a judgment perpetually en-

joining defendants, Herndon and Swanger, and declaring unconstitutional both acts assailed in the bill. Defendants appealed from the judgment.

SPECIFICATION OF ERRORS.

The assignment of errors filed in the circuit court (Rec. p. 51) sets forth the principal errors complained of in the judgment of the circuit court. For the purposes of this brief, the following are assigned:

1st. The court erred in overruling the demurrer to the bill.

2nd. The court erred in holding invalid the act of the Legislature of the State of Missouri, approved March 19, 1907, and that approved March 13, 1907.

3rd. The Court erred in granting a permanent injunction against defendants.

4th. The relief granted exceeds that warranted by the prayer of the bill or the facts stated therein.

BRIEF OF THE ARGUMENT.

APPELLANTS' CONTENTIONS.

On behalf of appellants, we contend:

First: The act of March 19, 1907, as construed by the Missouri courts, is inapplicable in fact to the case made by the bill, and is a valid enactment.

Second: On the facts stated in the bill, appellee is not in a position to assail the act of March 19, 1907.

Third: Since the act of March 19, 1907, is valid, no case is made against Herndon.

Fourth: No grounds for equitable interposition, as against Herndon, are stated in the bill.

Fifth: The bill shows no real controversy between appellee and Herndon.

Sixth: The bill attempts to join two distinct proceedings.

Seventh: This suit is within the prohibition of the Eleventh Amendment.

Eighth: Since no case is made against Herndon, the suit as against Swanger cannot be maintained.

Ninth: The act of March 13, 1907, is not repugnant to the Constitution of the United States, nor the Constitution of Missouri.

1. The act is not violative of article 3, the Interstate Commerce clause, nor the Fourteenth Amendment.

2. The act does not impair the obligation of any contract between appellee and the State.

(a) No contract between appellee and the State arose from the provisions of the act of 1870.

(b) The act of 1870 contains no guaranty relative to the right to resort to Federal courts.

(c) Though the act of 1870 be construed to create a contract between appellee and the State, the examination of the validity of the act of March 13, 1907, is to be restricted to the case made by the bill.

3. The license procured in 1902 is revocable.

Tenth: The decree is too broad.

POINTS.

AS CONSTRUED BY THE COURTS OF MISSOURI, THE ACT OF MARCH 19TH, 1907, IS INAPPLICABLE TO THE FACTS STATED IN THE BILL.

Injunctive relief against defendant, Herndon, prosecuting attorney, is sought on the ground of the alleged unconstitutionality and invalidity of the "Act of March 19, 1907" (Section 1075, R. S. 1899, amended), (Appendix, p. 51), which contains a clause enjoining upon the several prosecuting attorneys the duty of enforcing its provisions, which behest the bill alleges Herndon was threatening to obey.

The act or section referred to in the bill as the act of March 19, 1907, is, in fact, section 1075, Revised Statutes of Missouri of 1899, amended, and has been in force in Missouri, so far as applicable to the facts stated in the bill, in identical form, since 1865 (Laws of 1864-5, page 48,) except that the penalty clause was not added until 1881.

That portion of section 1075, as re-enacted in 1907, Laws 1907, pages 185-187 (See Appendix, page 51 hereof), most pertinent to the questions presented by this record, reads as follows:

> "And they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal, all trains carrying passengers at the junction of all branch railroads of the same system which said branch railroads are eighteen miles or more in length, and at the terminus of

which is located any county seat town of any county in this State, a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting and intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning, operating or leasing any railroad in this State, shall keep all its depots, stations or passenger houses, whether located at the crossing or intersection of other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporations or company refuses, neglects or fails to comply therewith, forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "railroad corporations," as used in this act, shall

include the term "railway company and railway corporations."

A comparison of section 1075, as re-enacted in 1907, with the same section as it stood from 1865 to 1907, discloses that the provisions as to branch lines were first added to the section in 1907, and that prior to that time the portion of the section quoted above, read as follows:

> "And they are hereby required to stop all trains carrying passengers, at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains or railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting or intersecting roads whenever the same shall be delivered to them," etc. (See Appendix, page 52.)

The words, "and they are hereby required to stop all trains carrying passengers, at the junction or intersection of other railroads," are still given character by the clause "a sufficient length of time to allow the transfer of passengers," etc., with which they stood in immediate connection in the section until the passage of the act of 1907, Laws 1907, page 186.

The words now separating these formerly conjoined clauses relate to branch lines only, were incorporated for the purpose of making the section applicable at junctions with branch lines of the same road, and were not designed to affect the meaning of the statute with respect to the requirement that all passenger trains stop at "intersections of other rail-

roads," nor to change the legislative purpose for making that requirement.

This is the theory of the bill, and that construction seems to result from an application of correct rules of statutory interpretation.

The amendment interjected by the act of 1907, Laws 1907, page 186, either *did destroy* the connection in meaning and construction between the provision that all trains carrying passengers must stop at "junctions and intersections of other railroads," and the clause "a sufficient length of time to allow transfer of passengers," etc., or it *did not* destroy that connection.

The words added in 1907 relate solely to connections with branch lines, and may be disregarded under the allegations of the bill, which relate solely, in this connection, to stopping trains at the intersection of appellee's railroad with another road.

1. If the clause which formerly qualified the provision of the statute under consideration, relating to stopping passenger trains at the intersection of other roads, no longer qualifies it, then there is left to be considered here but this language:

> "And they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads"

So construed, this last quoted clause stands out as distinct in its purpose from the remainder of the section.

Statutes requiring trains to stop at the intersection of the track on which they are running with the tracks of other railroads have been quite generally recognized as valid police regulations.

> I. & St. L. R. R. Co. vs. The People, 91 Ill. l. c. 455-456.

Birmingham R. R. Co. vs. Jacobs, 92 Ala. l. c. 191.

R. & D. R. R. Co. vs. Freeman, 97 Ala. l. c. 297.

P. & P. U. R'y Co. et al. vs. P. & F. R'y Co., 105 Ill. l. c. 117.

C. & A. R. R. Co. vs. J. L. & A. R'y Co., 105 Ill. l. c. 400.

S. A. & A. P. R'y Co. vs. Bowles, 88 Texas l. c. 639-640.

Louisville R'd Co. vs. E. T. R'y Co., 22 U. S. App. l. c. 110.

State ex rel. vs. K. C., Ft. S. & G. R. R. Co., 32 Federal Rep. l. c. 724. (Opinion by Judge Brewer.)

Ches. & Ohio. R'y Co. vs. Com. 99 Ky. l. c. 176.

Com. vs. Ches. & Ohio R'y Co., 29 S. W. 136.

F. & P. M. R. R. Co. vs. D. & B. C. R. R. Co., 64 Mich. l. c. 370.

K. C. Sub. B. R'y Co. vs. K. C., St. L. & C. R'y Co., 118 Mo. l. c. 623.

L. S. & M. S. R. R. Co. vs. R'y Co., 30 Ohio St., 610 et seq.

33 Cyc., 670-671.

Freund on Police Power, Sec. 73.

Southern R'y vs. King, 87 C. C. A. l. c. 290.

Elliott on Railroads, 2d Ed., Sec. 668.

Cleveland, &c. R'y Co. vs. Illinois, 177 U. S. l. c. 522-523.

State of Iowa vs. C. M. & St. P. R'y Co., 122 Iowa l. c. 24, et seq.

If the construction be adopted that the words added in 1907 destroyed the former qualification of the requirement

that trains stop at track intersections, the statute is valid, and the case as against Herndon fails.

2. If the other construction is to be adopted, and the theory of the bill to that extent accepted as correct, the same question is presented as if the act of March, 1907, had never been passed.

Assuming, henceforward, the correctness of this construction, we call attention to the following:

(1) The allegations of the bill as to the meaning and effect of the act of March 19, 1907, are not material, since it is settled that:

> "If the pleading misstates the effect and purpose of a statute upon which the party relies, the adverse party, in demurring to such pleading, does not admit the correctness of the construction, or that the statute imposes the obligation or confers the rights which the party alleges."
>
> Pennie vs. Reis, 132 U. S. l. c. 470.
>
> Finney vs. Guy, 189 U. S. l. c. 343-344.

In accordance with this rule it becomes necessary to look to the act itself, and to the construction put upon it by the State courts, in order to determine its scope and meaning. The rules applicable under these circumstances seem plain.

In the case of W. W. Cargill Co. vs. Minnesota, 180 U. S. l. c. 466, this court reaffirmed the rule that it would adopt

> "The interpretation of a statute of a State affixed to it by the court of last resort thereof."

And in the case of Missouri Pacific Railway Company vs. Nebraska, 164 U. S. l. c. 414, it was said that:

> "The construction so given to the statue by the highest court of the State must be accepted by

this court in judging whether the statute conforms to the Constitution of the United States."

In numerous cases the rule has been stated, e. g.: Smiley vs. Kansas, 196 U. S. l. c. 455; Jacobson vs. Massachusetts, 197 U. S. l. c. 24; Chicago Union Bank vs. Kansas City Bank, 136 U. S. l. c. 235; Endlich on Interpretation of Statutes, section 364; Louisville & Nashv. R. Co. vs. Kentucky, 183 U. S. l. c. 508; Baltimore Traction Co. vs. Baltimore Belt R'y Co., 151 U. S. l. c. 138; Carroll vs. Safford, 3 Howard l. c. 460; Elmendorf vs. Taylor, 10 Wheat. l. c. 159.

And it is not material that the construction given a statute by the State court was reached by a different rule of construction from that recognized in this court.

Smiley vs. Kansas, 196 U. S. l. c. 455.

Waters-Pierce Oil Co. vs. Texas, 177 U. S. l. c. 43.

Nor will this court disregard the construction of a State statute by the State courts and affix to the statute a meaning adverse to that given it by the State courts and repugnant to the Constitution of the United States.

Missouri, Kas. & Tex. R'y vs. McCann, 174 U. S. l. c. 586.

Tullis vs. L. E. & W. R. R., 175 U. S. l. c. 353.

(2) The statute, therefore, which Herndon, appellant, is alleged to have been threatening to enforce against appellee, should be applied, as construed by the Misouri courts, and as if that construction had been incorporated in the letter of the statute by the Legislature.

(3) To accomplish this end this court will take judicial notice of the decisions of the courts of Missouri construing this statute.

Lamar vs. Micou, 114 U. S. l. c. 223.

Liverpool Steam Co. vs. Phoenix Ins. Co., 129 U. S. l. c. 445.

(4) In the first of the Missouri decisions construing section 29, page 340, Gen. Stats. 1865 (now section 1075, R. S. 1899, amended 1905 and 1907), the Supreme Court of Missouri in 1883, in the case of Logan vs. H. & St. J. R. R. Co., 77 Mo. l. c. 666, said:

> "It is contended that inasmuch as defendant's road and the Chicago, Burlington & Southwestern R. R. formed a junction at Laclede, it was the duty of defendant, under section 29, General Statutes, 340, to stop all its passenger trains at Laclede to enable passengers to get on and off. That section has no application to passengers, other than those who desire to transfer from a train on one of the roads to a train on the other. That is the language of the section, and it can be invoked against the company in behalf of no one except a passenger who wishes to make a transfer. A passenger whose destination is Laclede may take the chance of such a stoppage, if there are others on the train who desire to transfer, but the company owes him no duty to stop there for his accommodation."

In 1881 the Legislature of Missouri added that portion of the section which provides a penalty for failure to comply with the act.

Thereafter, construing a separate provision of the act, however, the Supreme Court of Missouri in effect reannounced the doctrine of Logan vs. H. & St. Joe R'y, *supra*, holding that the act was penal in character, must be strictly construed, and that the provision as to the erection of depots

at crossings was designed more to provide accommodations for inter-line passengers than to secure them for residents in the vicinity of the crossing. This decision, while directly concerned with a different clause of the section, yet is in harmony with the decision in the former case, extending the principle of that former decision to another and additional provision of the section, the complement of that considered and construed in the Logan case, and applicable in this case.

State ex rel. vs. W. St. L. & P. R'y Co., 83 Mo. l. c. 148.

In the case of State ex rel. McPherson, Pros. Atty. vs. Railroad, 105 Mo. App. Rep. 207, 211, the Kansas City court of appeals, the court of last resort in that case, had occasion to discuss and construe the provision of the statute in question, which it did, as follows (l. c. 211, et seq.):

> "The foregoing is a penal statute. It enjoins upon railroad companies the duty to do certain things which, if not done, subjects them to the payment of a fixed penalty; and being penal, it must be strictly construed so as not to enlarge the liability it imposes, nor allow a recovery under it unless the party seeking it brings his case strictly within the terms or conditions authorizing it. State vs. Railway, 83 Mo. l. c. 148; Parish vs. Railway, 63 Mo. 284.
>
> The evident purpose the Legislature had in view in its enactment requiring railroad passenger carriers to stop all their passenger trains at the junction or intersection of other railroads a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of such intersecting railroads, was to afford facilities to persons traveling on one railroad

and destined to some point on another intersecting it. State vs. Railway, 83 Mo. *supra;* Logan vs. Railway, 77 Mo. 663.

The evidence adduced at the trial tends to show that the defendant road was intersected by the Kansas City, Fort Scott & Memphis Railroad at Aurora, in this State, and that the defendant ran three trains each way each day, which stopped regularly at Aurora Junction to receive passengers, baggage, mail and express freight from such intersecting railroad. It further tended to show that defendant ran a train each way each day, known as the Texas Limited and St. Louis Limited, which was not scheduled to stop at Aurora Junction. It was in effect conceded that the defendant's three trains which stop regularly at Aurora took care of and accommodated all the business originating upon or destined to points on said intersecting railroad, so that there was no occasion for said limited trains which followed them, to stop at Aurora. It is true, that it appears from the testimony of respondent's conductor, engineer and other employees, that for many of the days included in the two periods of time specified in the petition that it, respondent, did not stop its said limited trains at Aurora; but was this sufficient to establish a *prima facie* case? To establish such a case it devolved on the relator to prove that passengers, personal baggage, mails and express freight from said intersecting railroad was at Aurora on a day mentioned in one of the counts of the petition, and that the said limited trains did not then and there stop a sufficient length of time to accomplish the transfer from the former to the latter

The construction of a statute should accord with reason and common sense, and should not re-

quire unreasonable things. Cole vs. Railroad, 47 Mo. App. 624. The reason of the law should prevail over its letter, and general terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence, the presumption being that the Legislature intended no such anomalous results. Verdin vs. St. Louis, 131 Mo. 26. A construction of this statute which would require the respondent to stop all of its trains at Aurora Junction, whether or not passengers, baggage, mail and express freight from its intersecting railroad is there waiting to be transferred and carried by it further along on its line would be an unreasonable and oppressive requirement. Suppose the respondent should run, as it may do, ten passenger trains each way each day over its road. Suppose, further, that the intersecting road should only run one, and on its arrival at Aurora, the respondent should, without delay, have trains there ready to receive the passengers, baggage, mail and express freight from it so as to leave nothing there for the other nine trains to carry. And suppose, further, that three of its ten trains stopping there, including that just referred to, afforded ample facilities for the local travel to and from there; would any court say that a reasonable construction of the terms of this statute would require the remainder of such trains to stop, too, though there was nothing for them to do? In a State like this where the great through lines of railway running north and south and east and west so often intersect each other, and are intersected by local roads, a construction of the statute here requiring that they stop all of their trains at each of said intersections, whether or not there be any persons, baggage, mails or express matter from the in-

tersecting roads to be carried by them, would render the rapid transit of persons, property and the mails from the east to the west, and from the north to the south, and the reverse, impossible; and this the Legislature, by the statute, never intended to do.

Neither the evidence introduced, nor that rejected, tended to prove that on any day within either of the periods of time specified in either count of the petition, the respondent failed to stop one of its trains at Aurora Junction when there was any passenger, baggage, mail or express matter from the connecting railroad to be transferred and carried on either of such trains not stopping, and therefore the proof was insufficient to make out a case under the statute. The fact that a witness testified that he had bought a ticket from an Arkansas point to Aurora, where he had lived, and that he was required to leave the limited train before reaching Aurora and to take a local train that stopped at Aurora, in the light of Logan vs. Railway, *supra*, could have no bearing on the case.

It is difficult to see how the action of the court in excluding from the evidence the petition to compel the production of the train sheets, etc., the train dispatches, record, time tables, statements of respondent's agents, etc., harmed the relator since such excluded evidence did not supply the deficiency to which we have previously referred. If this excluded evidence had been admitted it would have showed no more than that said trains did not stop at Aurora at the dates alleged in the petition, and even with such excluded evidence in, the result would not have been different."

(5) That these decisions are applicable to the construction of the statute in its present form, though amended and

re-amended, repealed and by the repealing act re-enacted, since their rendition, is apparent from the rule that the re-enactment of a statute in the same language conclusively implies the adoption by the Legislature of the judicial construction theretofore put upon that language. The decisions construing the statute thereby become part of the re-enacted statute.

Endlich on Interpretation of Statutes, Sec, 367.

Lewis' Sutherland Statutory Construction, Sec. 399 (255).

Sedgwick Construction of Stat. and Const. Law, pp. 214, 215.

Handlin vs. Morgan County, 57 Mo. l. c. 116.

Easton vs. Courtwright, 84 Mo. l. c. 34.

Mason et al. vs. Fearson, 9 Howard l. c. 258.

And this statutory provision, in this identical language, has existed in Missouri since 1864 (Acts of Mo. Legislature, 1864-5, page 48), some years prior to the advent of appellee or any of its predecessors into the State.

Of the general statutes of Missouri relating to corporations, of their existence, of the time they took effect and of their precise terms, the courts of Missouri take judicial notice.

Brannock vs. St. L., M. & S. R'y Co., 200 Mo. l. c. 569.

Bowie vs. Kansas City, 51 Mo. l. c. 460.

Emerson vs. St. Louis & H. R'y Co., 111 Mo. l. c. 165.

Bowen vs. The Mo. Pac. R'y Co., 118 Mo. l. c. 547.

Consequently the circuit court of the United States, sitting in Missouri, and this court on appeal therefrom, will take judicial notice of such statutes to an equal extent.

Covington Drawbridge Co. vs. Shepherd et al., 20 How. l. c. 232.

(6) The complaint of appellee against appellant, Herndon, is found in the eighth paragraph of the bill (Rec. p. 19), and is, in substance, that:

Herndon, as prosecuting attorney of Clinton county, in which county is located the crossing mentioned in the bill, "threatened, and still threatens," to prosecute appellee under the act of March 19, 1907, "for the purpose of recovering the penalty of 25.00 per day for each day since the 21st day of July, 1907," upon which appellant has operated some of its trains past the crossing mentioned without stopping them for the interchange of passengers and baggage; that Herndon "threatens to, and will," unless enjoined, "put in motion the special provisions of the said law of March 19, 1907, for the enforcement of the said penalties of $25.00 per day, since July 21, 1907, and under the pain of these accumulating penalties, which in a short space of time, will amount to many thousands of dollars, will, unless enjoined herein, bring suits against your orator to collect said penalties, unless your orator sacrifices the facilities it now maintains, and which circumstances compel it to maintain for the proper handling of interstate business. And your orator shows to the court, that as *heretofore* set forth, it has not stopped all of its trains carrying passengers at the said station of Lathrop, in compliance with the aforesaid law of March 19, 1907."

The fifth and sixth paragraphs of the bill allege in substance that the only trains which do not stop are two, "which trains are maintained primarily for the purpose of transporting the interstate passenger traffic of your orator, and for the carriage of the United States mails."

The bill also alleges in paragraph five, "that *except under unusual circumstances, passengers seldom find it convenient to change* from the railway of your orator to that of the Atchison, Topeka & Santa Fe Railway Company at the said station of Lathrop."

The bill alleging that the only trains which appellee re-

fuses to stop are through or interstate trains, that passengers seldom, except under unusual circumstances, desire to change from the C., R. I, & P. to the A., T. & S. Fe at Lathrop, and *wholly failing to allege that either of the trains* which do not stop, *ever carry, or have ever carried, or will ever carry,* any interline passenger, baggage, express or mails, entirely fails to allege any violation or intended violation, in fact, by appellee, of the act of March 19, 1907 (Sec. 1075), the enforcement of which by Herndon the bill is brought to enjoin.

II.

ON THE FACTS STATED IN THE BILL APPELLEE IS NOT IN A POSITION TO ASSAIL THE ACT OF MARCH 19TH, 1907.

That the purpose of the statute is misconceived by appellee, in part, is evidenced by those allegations of the bill concerning the size and business of the town of Lathrop and the adequacy of the passenger service provided by appellee to met the needs of that community.

The statute is designed to secure proper facilities for the accommodation of those passengers of each intersecting road whose destination is some point on the other.

This was the construction given this statute by the Supreme Court of Missouri in

State ex rel. vs. The W. St. L. & P. R'y Co., 83 Mo. l. c. 148.

Logan vs. H. & St. J. R. R. Co., 77 Mo. l. c. 666.

State ex rel. vs. Railroad, 105 Mo. App. l. c. 212.

Appellee has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. Its right is limited solely to the inquiry as to its effect in the case which it presents.

Castillo vs. McConnico, 168 U. S. l. c. 680.

In case the only ground urged as invalidating a State statute by reason of repugnancy to the Federal Constitution is based upon a construction of the statute contrary to that given it by the State courts, no federal question is involved.

Baltimore Traction Co. vs. Baltimore Belt R'd Co., 151 U. S. l. c. 138.

An act affecting different classes may be unconstitutional insofar as it affects some and valid as to the rest. In such case one of a class within the valid provisions of the act cannot set up the unconstitutionality of the provisions which are inapplicable to him.

Supervisors vs. Stanley, 105 U. S. l. c. 311.

In re Garnett, 141 U. S. l. c. 12.

Clark vs. Kansas City, 176 U. S. l. c. 118.

Patterson vs. Bark Eudora, 190 U. S. l. c. 176.

Cooley's Const. Lim., p. 250.

Reduction Co. vs. Sanitary Works, 199 U. S. l. c. 318.

Hatch vs. Reardon, 204 U. S. l. c. 160-161.

This case must be restricted to the facts set up in the bill of complaint.

That portion of the act of 1907, then, relative to stopping trains at junctions with branch lines, etc., is not involved in this case and cannot be considered in determining the constitutionality or unconstitutionality of the act of 1907.

It is to be kept in mind that the sole offense for which the bill avers Herndon threatens prosecution is that appellee failed to stop its through trains for the transfer of baggage and passengers.

It is not averred that appellee is about to be prosecuted for failure to accept passengers for Lathrop, or from Lathrop,

on these trains. It is the bare, unqualified failure to stop, on which Herndon is alleged to propose to found his suit.

It is clear that under the construction given by the Supreme Court of Missouri to the very provision of the law under which Herndon threatens to sue, that he could not possibly maintain such a suit. In other words, appellee places a construction upon the act of March 19, 1907, which it does not support and will not bear, alleges that it is to be sued under said act in regard to things which the act in nowise deals with, and then asks that the act be held unconstitutional because appellee's incorrect construction might make it so.

III.

THE ACT HAVING BEEN IN FORCE SINCE PRIOR TO APPELLEE'S ENTRANCE INTO MISSOURI, APPELLEE CANNOT ASSAIL IT.

The provisions of the act (of March 19, 1907, Sec. 1075, R. S. 1899, amended), which are challenged by appellee, were in force in Missouri at the time appellee and its predecessors entered the State.

As a consequence, appellee is not in a position to question their validity.

Daggs vs. Orient Ins. Co., 136 Mo. l. c. 398-399.

Orient Insurance Co. vs. Daggs, 172 U. S. l. c. 566-567.

Louisville & Nash. R'd Co. vs. Kentucky, 183 U. S. l. c. 512-513.

IV.

THE ACT OF MARCH 19TH, 1907, AS CONSTRUED BY THE COURTS OF MISSOURI, IS VALID.

That a regulation of the character of that being discussed is not repugnant to any provision of the Federal Con-

stitution or acts of Congress, is indicated by the views expressed and the cases cited in the cases of

N. Y., N. H. & H. Railroad vs. New York, 165 U. S. 631, et seq.

Missouri vs. Larabee Mills, 211 U. S. l. c. 621, et seq.

Gladson vs. Minnesota, 166 U. S. l. c. 430, et seq.

Cleveland, &c. R'y Co. vs. Illinois, 177 U. S. l. c. 522-523.

Always reluctant to declare that a statute conflicts with the State Constitution, before that question has been presented to and determined by the State courts, that reluctance "becomes more imperative when the statute has been before the highest court of the State and a decision rendered upon the assumption that is valid, and this, although the direct question of validity, was not presented nor determined."

Michigan Central Railroad vs. Powers, 201 U. S. l. c. 291.

"The primary and fundamental ground on which such suit" as this "rests" is the invalidity of the statute, the enforcement of which is sought to be restrained.

That statute being valid when properly construed, and as applicable to the facts stated in the bill, this suit as against Herndon must fail, even were the bill otherwise sufficient.

Pacific Express Co. vs. Seibert, 142 U. S. l. c. 348.

V.

THE BILL CONTAINS NO GROUNDS FOR EQUITABLE INTERPOSITION AS AGAINST HERNDON.

The bill, we think, states no ground for injunctive relief against Herndon. The portion of the bill leveled against Herndon fails to state a case of which equity will take cognizance.

Though the statute assailed be invalid, yet the complainant, in addition, must allege facts bringing the case within some head of equity jurisdiction.

Cruickshank vs. Bidwell, 176 U. S. l. c. 80.

Pacific Express Co. vs. Seibert, 142 U. S. l. c. 348.

There is no allegation in the bill that appellee has violated, or intends to violate, the provisions of the statute.

Without an averment that the act has been, is being or will be violated, *no penalties can accumulate,* and the bill, in legal effect, pleads a plain, adequate and complete remedy at law.

But assuming again that the act is unconstitutional when applied to the conditions described in the bill, and further assuming that the bill alleges continued and continuing violations, by appellee, of the letter of the act, yet should injunctive relief against Herndon be denied, since as against him the bill for another reason, discloses no equity?

There is no allegation that *any* suits for penalties under the act have been brought.

There is no allegation that Herndon intends or threatens to bring successive suits against appellee and thus involve it in vexatious litigation.

If but a test case or two is threatened, and nothing more is alleged by the bill, appellee's rights can be adjudicated therein and, if it succeed, the judgment there rendered will effectually end the controversy. The bill sets up a complete defense at law to any such suit.

There is no *presumption,* arising from the mere possibility that it *might* be done, that the State, through its officers, will institute a series of successive suits and involve complainant in vexatious litigation.

Pacific Express Co. vs. Seibert 44 Fed. l. c. 315; affirmed in Pacific Express Co. vs. Seibert, 142 U. S. 339.

There must be a real and not an imaginary danger of a multiplicity of suits. There must be a legally founded, reasonable anticipation, not merely a fear, that a multiplicity of suits might result.

3 Pomeroy's Eq. Jur., Sec. 251,¾, Vol. I (3rd Ed.).

Pac. Express Co. vs. Seibert, 44 Fed. l. c. 315; affirmed in Pacific Express Co. vs. Seibert, 142 U. S. 339, 355.

There should be some allegation in the bill that a *multiplicity* of suits is pending, or threatened, if that ground is to be relied on.

T. & B. R'd Co. vs. B., H. T. & W. R'y Co. et al., 86 N. Y. l. c. 128.

Pomeroy's Eq. Jur., Sec. 250, Vol. I, (3rd Ed.).

A mere allegation of irreparable injury is not sufficient. "Facts must be alleged from which the court can reasonably infer that such would be the result."

Cruickshank vs. Bidwell, 176 U. S. l. c. 81.

By the removal of the cause, if instituted in the State court by Herndon, the appellee would have had an adequate remedy at law, and that in the same jurisdiction in which this suit was instituted.

Notwithstanding the act of March 13, 1907, the cause could have been removed.

Cable vs. United States Life Ins. Co., 191 U. S. 306-307.

The controversy between Herndon and appellee is not a real one.

It is not directly alleged in the bill that defendant, Hern-

don, as prosecuting attorney, had adopted and will endeavor to enforce a construction of the act of March 19, 1909 (Sec. 1075, R. S. 1899, amended), which includes appellee's interstate trains within its scope.

The fact that such a construction contravenes that adopted by the Supreme Court and Courts of Appeals of Missouri, would seem to repel any inference that Herndon contemplated adopting and attempting to enforce such a construction.

Assuming, however, that the allegations of the bill warrant such an inference, yet the bill

> "Put forward no existing controversy as to the effect or construction of the Constitution on which the relief depended, and set up no right which might be defeated or sustained according to such construction."
>
> Arbuckle vs. Blackburn, 191 U. S. l. c. 413-415.

In that case Arbuckle sought to enjoin Blackburn, as commissioner, from *misconstruing* the pure food law of Ohio, in such wise as to apply it to coffee prepared by the former, to which, when properly construed, it was not applicable.

The case at bar is of like character. The fact that appellee also misconstrued the Missouri act does not affect the matter.

VI.

THE BILL ATTEMPTS TO JOIN TWO DISTINCT PROCEEDINGS.

If this court should hold the allegations of the bill sufficient to support a judgment against Herndon and against Swanger, we respectfully suggest that the rule as to multifariousness applies.

In case of such a holding it could not be denied that the

bill states two independent causes of action, without connection or common origin against separate defendants; that the evidence pertinent to one cause would not be so as to the other; each can be determined fully without reference to the other; the decree as to each defendant is exclusively applicable to him; the relief against each defendant is distinct as against the other; neither defendant's obedience to the decree affects that of the other defendant; the misjoinder is manifest.

These things form the test of multifariousness, according to Chancellor Gibson.

Streets Federal Equity Prac., Sec. 440.

Gaines vs. Chew, 2 How. l. c. 642.

Brown vs. Guarantee Trust Co., 128 U. S. l. c. 412.

And this objection can be taken despite the fact that the question was not raised specifically by the demurrer.

"Multifariousness as to subjects or parties, within the jurisdiction of a court of equity, cannot be taken advantage of by defendant, except by a demurrer, plea or answer to the bill, although the court in its discretion may take the objection at the hearing or on appeal, and order the bill to be amended or dismissed."

Hefner vs. Northwestern Ins. Co., 123 U. S. l. c. 751.

"Multifariousness can be taken advantage of by demurrer, plea or answer; and where it is manifest upon the face of the bill that two causes of action are presented, the defense can be interposed by general, as well as by special, demurrer.

Emmons vs. Nat. Mut. B. & L. Ass'n, 68 C. C. A., l. c. 330, and cases and authorities cited.

If the bill be held insufficient as against either Herndon or Swanger, this objection is answered.

Brown vs. Guarantee Trust Co. 128 U. S. 412.

VII.

THIS SUIT IS WITHIN THE PROHIBITION OF THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The general rule is "that a suit against individuals for the purpose of preventing them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of" the Eleventh Amendment.

Smyth vs. Ames, 169 U. S. l. c. 518-519.

Ex parte Young, 209 U. S. l. c. 149, et seq.

In the case at bar the Secretary of State is not required to enforce the penalties of the act of March 13, 1907. He can bring no suits, institute no prosecutions. The Secretary is not charged by the bill with being "about to commit some specific wrong or trespass to the injury of the complainant's rights" unless the mere revocation of complainant's license, and giving the notice required by the act, can be said to be such a "specific wrong or trespass."

Under the facts alleged, this appears to be a suit merely to test the constitutionality of the act of March 13, 1907, by suit against the Secretary of State, as such. If so, it cannot be maintained.

Fitts vs. McGhee, 172 U. S. l. c. 530, et seq. and cases cited.

Ex parte Young, 209 U. S. l. c. 156-157.

In re Ayres, 123 U. S. 443.

In the latter case it was said, at page 157:

> "In making an officer of the State a party defendant in a suit to enjoin the enforcement of an

> act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party."

In view of the fact that the bill states no case against Herndon (save one attempted to be predicated upon an inadvertent misconception of the intent and effect of the act of March 19th, 1907), the bill consists only of an effort to test the validity of the act mentioned.

No suit has been removed by appellee. None has been instituted save this one, and its purpose, so far as facts are plead, is to have the acts of March 13th and 19th, 1907, declared invalid to test their constitutionality.

We suggest that this brings the case within the rule above quoted.

VIII.

SINCE NO CASE IS MADE AGAINST HERNDON, THE SUIT AGAINST SWANGER CANNOT BE MAINTAINED.

The bill failing to state grounds of injunctive relief against Herndoon, there is left in this case only a suit against the Secretary of State to restrain him from revoking appellee's license *because of the institution of this suit to so restrain him.* It is not alleged that appellee has instituted in, or removed any other case to a Federal Court.

The bill proceeds in a circle. Such a proceeding seems to fall within the rule that this court will concern itself only with real controversies.

> Chicago &c. R'y Co. vs. Wellman, 143 U. S. l. c. 345.
>
> Tyler vs. Judges, etc., 179 U. S. l. c. 409.
>
> Hooker vs. Burr, 194 U. S. l. c. 419.
>
> Singer Mfg. Co. vs. Wright, 141 U. S. l. c. 700.

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When in determining rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

California vs. San Pablo &c. Railroad, 149 U. S. 314.

Tyler vs. Judges, &c., 179 U. S. l. c. 408-409.

Turpin vs. Lemon, 187 U. S. l. c. 60-61.

If it be argued that the authority of the Secretary of State to revoke licenses is not conditioned upon the appellee's *maintaining* its suit, but solely upon the *institution* of it, we think that, nevertheless, the above rule applies, as indicated by the authorities cited and in

Arbuckle vs. Blackburn, 191 U. S. l. c. 413-415.

Baltimore Traction Co. vs. Baltimore Belt Rd. Co., 151 U. S. l. c. 138.

If this be not true, this case could as well be maintained had Herndon not been joined at all. In fact that is the identical situation presented, unless it can be said that appellee can be heard to complain of a statute which does not exist. For the act as construed by appellee and complained of, as respects Herndon, does not exist in Missouri.

IX.

THE ACT OF MARCH 13TH, 1907, IS NOT REPUGNANT TO ARTICLE THREE OF THE CONSTITUTION.

The allegation that the act of March 13th, 1907, is violative of section two of article three of the Constitution of the United States is answered by the cases of

Doyle vs. Continental Ins. Co., 94 U. S. 535.

Security Mutual Life Ins. Co. vs. Prewitt, 202, U. S. 246.

Cable vs. United States Life Ins. Co., 191 U. S. 288.

The guaranty in article three as to trial by jury, relates to the trial of *crimes*.

Nashville &c. R'y. vs. Alabama, 128 U. S. l. c. 101.

X.

THE ACT DOES NOT VIOLATE THE INTER STATE COMMERCE CLAUSE OF THE CONSTITUTION.

The act of March 13th, 1907, does not contravene section eight of article one of the Constitution of the United States, nor the laws passed in pursuance thereof.

The act itself specifically permits the transaction of interstate business by appellee even after revocation of its license for violating the act, thus exempting complainant's interstate business from its operation.

Waters-Pierce Oil Co. vs. Texas, 177 U. S. l. c. 46.

Louisville and Nashville Rd. Co. vs. Kentucky, 183 U. S. 512, 518.

XI.

APPELLEE IS NOT DENIED THE EQUAL PROTECTION OF THE LAWS.

There is no invasion of appellee's right to the "equal protection of the laws."

> Ducat vs. Chicago, 10 Wall. l. c. 415, and cases cited.
>
> Norfolk R'y. Co. vs. Penn., 136 U. S. 118.

In addition to the rule invoked, it is to be noted that the case against Swanger is wholly dependent upon that against Herndon; that that against Herndon is grounded solely, as to federal jurisdiction, upon diversity of citizenship. There is no federal question in the bill as against Herndon.

> Baltimore Traction Co. vs. Baltimore Belt Rd. Co., 151 U. S. l. c. 138.

To that class of cases, then, this case should be confined in decision.

No domestic corporation can remove to, or institute in, the Federal courts sitting in Missouri, a case in which jurisdiction is dependent upon diversity of citizenship.

The act, therefore instead of destroying equality, effects it.

> Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. l. c. 257.

In this case it was said under somewhat similar circumstances:

> "The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones."

The classification was not an illegal one.

Board of Education vs. Illinois, 203 U. S. l. c. 561.

Pembina Mining Co. vs. Pennsylvania, 125 U. S. l. c. 188, et seq.

Legislation dealing with railroads as a class has been frequently upheld.

Missouri Railway Co. vs. Mackey, 127 U. S. l. c. 209.

Minneapolis Railway Co. vs. Beckwith, 129 U. S. l. c. 29.

Missouri Pacific Railway vs. Humes, 115 U. S. 512.

The complainant in American Smelting Co. vs. Colorado, 204 U. S. 103, 114, was protected by a *contract* with the State, based upon valid consideration, explicitly protecting the company from the double taxation attempted to be imposed by the act condemned in that case.

The statute of Kentucky upheld in the Prewitt case dealt with but one kind of foreign corporations—insurance companies. The same was true of the statute held valid in the Doyle case.

Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. l. c. 248.

Doyle vs. Continental Ins. Co., 94 U. S. l. c. 536-537.

The bill does not allege in terms that there are any domestic railroad corporations in Missouri. The nearest approach thereto, is found on page 24 of the record, paragraph (h).

To warrant this court in declaring a State statute invalid, a specific allegation of the facts showing that invalidity is requisite. Without such allegation in the bill, there is yet

less basis for a contention that this legislation discriminates against foreign railway corporations.

And assuming that the bill alleges the existence of domestic railways in Missouri, yet the classification is valid according to the Prewitt and Doyle cases, supra, and according to the ruling in

Norfolk & Western Rd. Co. vs. Penn., 136 U. S. l. c. 118.

XII.

THERE IS NO INFRINGEMENT OF ARTICLE TWO, CONSTITUTION OF MISSOURI.

There is no violation of section ten of article two of the Constitution of Missouri, providing that courts of justice shall be open to every person, and certain remedy afforded for every injury, etc.

This provision of the Missouri Constitution is not violated by the act of March 13th, 1907, any more than it is infringed by or repugnant to the provision, or lack of provision, of the Federal statutes which prevents a domestic corporation bringing a suit against a citizen of Missouri in the Federal courts on the ground of diversity of citizenship. This Constitutional provision has relation to the State courts only.

XIII.

APPELLEE IS NOT DEPRIVED OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW NOR ITS PRIVILEGES AND IMMUNITIES ABRIDGED.

Revoking appellee's license, and prohibiting it from transacting business between points in Missouri does not take its property without due process of law.

This is true or the revocation by the insurance com-

missioner, etc., in cases involving statutes containing a like provision heretofore cited, could not have been permitted.

Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. l. c. 248, and cases cited.

Doyle vs. Continental Ins. Co., 94 U. S. l. c. 536, 537.

National Council U. A. M. vs. State Council, 203 U. S. 163.

Further, it is the *enforcement* of a law contravening the fourteenth amendment, not its enactment, which constitutes deprivation without due process.

Kaukauna Co. vs. Green Bay &c. Canal, 142 U. S. 269.

Yesler vs. Wash. Harbor Line Comm'rs, 146 U. S. l. c. 656.

The act is not obnoxious to section one of the Fourteenth Amendment to the Constitution of the United States, relating to the abridgement of "the privileges or immunities of citizens of the United States."

The privileges and immunities belonging to a corporation in a state other than that in which it is incorporated are dependent upon the will of such state. The state may exclude, ordinarily, or, having admitted a corporation, may expel it, unless that course be obstructed by some other provision than the one being considered.

The act abridges no immunity, denies no privilege which appellee could enjoy as a "citizen of the United States." The Constitutional provision invoked does not apply to appellee.

Waters-Pierce Oil Company vs. Texas, 177 U. S. l. c. 45-46.

Cooley's Const., Lim. (7th Ed.), p. 567.

Slaughter House Cases, 16 Wall. l. c. 74, et seq.

XIV.

APPELLEE AND ITS PREDECESSORS SECURED NO CONTRACT WITH MISSOURI UNDER THE ACT OF 1870.

It is alleged that the act in question impairs the obligation of a contract between the State and appellee, and is therefore repugnant to section ten of article one of the Constitution of the United States.

The contract thus relied upon is alleged to have resulted from the entrance of appellee, and its predecessors, into Missouri, and the acceptance by them of the provisions of certain statutes referred to in the bill.

The act of March 2, 1869 (Laws 1869, p. 75), after providing a method of consolidation, adds, in section four:

> "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be consolidated with the one in the adjacent state, as fully as if the consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State as if the consolidation had not taken place."

The consolidation under this act of The Chicago and Southwestern Railway Company, a Missouri corporation, with the Iowa company of the same name did not change the status of the former under the laws of Missouri or the United States.

Muller vs. Dows, 94 U. S. 444.

Leavenworth Co., Commissioners vs. Chicago R. I. & P. Ry. Co., 134 U. S. 688.

Livingston Co. vs. Portsmouth Bank, 128 U. S. l. c. 113-114.

Patch vs. Wabash Ry. Co., 207 U. S. l. c. 283.

The act of March 24th, 1870, referred to in the bill is identical with section 1060, R. S. Mo. 1899, except that in 1887, an amendment was added, subjecting roads having "running arrangements" with other roads, to the same liabilities as those imposed upon lessees of other roads, and excepting the amendment in 1881. (Rec. pp. 9-10.)

The first provision of the act of March 24th, 1870, authorized railroads to aid in the construction of other roads.

The second clause deals with companies which have built their roads "to the boundary line of the State," the first two clauses seeming to relate to domestic corporations only.

The third clause authorizes foreign companies to purchase *on condition* that the line of the purchasing company and the purchased line "are continuous or connected at a point either within or without this State."

The fourth clause authorizes any railroad corporation to "extend, construct, maintain *and* operate *its railroad* into and through this State."

None of these provisions vests a railroad corporation organized under the laws of another state, which has not constructed and does not own, and which does not intend to construct a line of railroad, but is organized *merely* to purchase, with the right to purchase a Missouri railroad.

The classes which the act affects are pointed out by the act, and none so pointed out includes The Iowa Southern and Missouri Northern Railroad Company with which company appellee consolidated in 1881, according to the bill.

The history of this line of road down to the sale to the last named company is found in

Leavenworth Co. Commissioners vs. Chicago, Rock Island and Pacific Railway Co., 134 U. S. 688, and in

Muller vs. Dows, 94 U. S. 444.

In the case at bar, however, appellee avers that, by the act of March 24th, 1870, an invitation was extended it that it accepted, and thereout sprang a contract with Missouri.

If the statute extended no invitation to appellee, it cannot predicate a claim of contract upon the statute.

Bienville Water Supply Co. vs. Mobile, 186 U. S. 218-219.

Contracts between states and railroads are not created by this court by implication in order that acts of State legislatures may be overturned.

Williams vs. Wingo, 177 U. S. l. c. 603.

Jackson vs. Lamphire, 3 Pet. l. c. 289.

Stone vs. Mississippi, 101 U. S. 816-817.

Central R'd. & Banking Co. vs. Georgia, 92 U. S. l. c. 670.

Without the contract which it asserts, and upon which it mainly relies, appellee becomes subject to the general rules with respect to foreign corporations operating in states other than that of their origin.

It is generally true, under such conditions, that a corporation

> "Is regarded as a citizen of the state which created it. *It has no faculty to emigrate.* It can exercise its franchises extra-territorially only so far as may be permitted by the policy or comity of other sovereignties."

St. Louis vs. Ferry Co., 11 Wall. l. c. 429.

Railroad Co. vs. Koontz, 104 U. S. l. c. 11.

Canada Southern R. Co. vs. Gebhard, 109 U. S. l. c. 537.

The license procured in November, 1902, as alleged, did not add to nor subtract from the rights theretofore possessed by appellee. No fees, no tax was paid to the State. Appellee was expressly exempted from such payment. (Laws 1895, p. 102). No roads have since been acquired, no expenditures induced by the license plead, so far as the bill shows. That act offered appellee no contract, and the bill does not proceed upon the theory of a contract thereunder.

The provisions of general law applicable to foreign railway corporations were not rendered immutable, petrified, by the license taken out in 1902, under the act of 1891.

Schurz vs. Cook, 148 U. S. 407, et seq.

Gregg vs. Granby Mining & Smelting Co., 164 Mo. 627.

Bienville Water Supply Co. v. Mobile, 186 U. S. 218-219.

Stone vs. Mississippi, 101 U. S. l. c. 816-817.

"A mere license by a State is always revocable. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect."

Doyle vs. Continental Ins. Co., 94 U. S. l. c. 540.

In speaking of the decision in the Doyle case this court said:

> "The point of decision seems to have been, that, as the State had granted the license, its officers would

not be restrained by injunction, by a court of the United States, from withdrawing it."

Barron vs. Burnside, 121 U. S. l. c. 199.

Schurz vs. Cook, 148 U. S. l. c. 409.

We think it is also to be observed, since appellee desires to rely upon rights alleged to have accrued to the Chicago Southwestern Railway Company under the act of 1870, that an immunity from the exercise of governmental power granted to a railroad company does not pass to the purchaser of its property and franchises at sale under foreclosure proceedings. This too, though such immunity be expressly granted the first company.

Rochester Railway Co. vs. Rochester, 205 U. S. l. c. 247.

Norfolk and Western Rd. vs. Pendleton, 156. l. c. 672-673.

Louisville & Nashville Rd. Co. vs. Palmes, 109 U. S. l. c. 252.

St. L. & S. F. R'y vs. Gill, 156 U. S. l. c. 656.

XV.

THE ACT OF 1870 INCLUDED NO GUARANTY WITH REFERENCE TO THE RIGHT TO SUE IN THE FEDERAL COURTS.

Assuming that appellee's immediate predecessor, The Iowa Southern and Missouri Northern Railroad Company, with which appellee consolidated, as alleged, was included among those corporations authorized by the act of 1870, to enter Missouri and transact a railroad business therein, yet whatever contract sprang from that company's entrance into the State by virtue of that statute, it had no reference to the

Federal courts. The language of the act with reference to the fourth class with which it deals, provides that railroads entering the State for certain purposes

> "Shall possess and exercise all the rights, powers and privileges *conferred* by the general *laws of this state* upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this State, concerning railroad corporations, as fully as if incorporated in this State."

This provision had no reference to the right of a foreign railway corporation to sue in the Federal courts or to remove cases thereto.

It deals only with those "rights, powers and privileges *conferred by the general laws of this state*" upon domestic corporations.

The State had no power to *confer* upon domestic corporations the right to sue in the Federal courts. And it is only the rights *conferred* upon *domestic* corporations which this statute could be construed to secure.

The sole ground of federal jurisdiction, so far as defendant Herndon is concerned is diversity of citizenship.

Certain Federal questions, it is true, are attempted to be raised in that branch of the bill.

But the bill with respect to Herndon, pleads facts which deny any interference with interstate commerce and no Federal question can be predicated upon a construction of a statute contrary to that placed upon it in the State courts. It was so held in

> Baltimore Traction Co. vs. Baltimore Belt Rd. Co., 151 U. S. l. c. 138.

Nor can the invalidity of the act of March 19th, 1907, be urged by one who is not in the class affected by its invalid provisions, if such there be.

Hatch vs. Reardon, 204 U. S. l. c. 160-161.

Reduction Co. vs. Sanitary Works, 199 U. S. l. c. 318.

No Federal question being in fact raised, which vests jurisdiction against Herndon, that jurisdiction is dependent upon diversity of citizenship only.

The suit as against Swanger, is grounded upon his threat to revoke appellee's license in case appellee instituted the suit against Herndon.

The case, therefore, involves only the right to revoke under the act of March 13th, 1907, because of the institution by appellee against Herndon of a suit wherein the sole ground of Federal jurisdiction is *diversity of citizenship*

No question, as to the State's right to prohibit the institution or removal by appellee of suits by reason of any other ground of federal jurisdiction, is presented by the bill, and that this investigation will be restricted to the case made, we think is shown by the following authorities:

Castillo vs. McConnico, 168 U. S. l. c. 681.

Supervisors vs. Stanley, 105 U. S. l. c. 311.

In re Garnett, 141 U. S. l. c. 12.

Patterson vs. Bark Eudora, 190 U. S. l. c. 176.

Reduction Co. vs. Sanitary Works, 199 U. S. l. c. 318.

Hatch vs. Reardon, 204 U. S. l. c. 160-161.

The bill, therefore, in effect, alleges a *contract* under the act of 1870, to the effect that the State will not revoke appellee's license to do business between points in Missouri because of appellee's resorting to the Federal courts, in a suit

against a citizen of Missouri, on the ground of diversity of citizenship.

This contention does not seem to be sound, for these reasons:

1. The act of 1870, could not have contemplated either the issuance or revocation of a license not in existence until twenty-one years later.

2. The provision of the act of 1876, relative to the right of a foreign corporation, to "sue and be sued in all cases and for the same causes, and in the same manner as a corporation of this state might sue and be sued," related rather to the cause of action than to the forum, and at all events, had no reference to Federal courts.

3. If that provision had in contemplation the right to sue in the Federal courts, it makes no pretense of guaranteeing that or any other right further than possessed by domestic corporations, which did not and could not include the right to institute suits in the Federal courts on the ground of diversity of citizenship. So far as the bill states, when measured by the standard fixed by this court, there is no threat to revoke appellee's license save for the institution of the suit against Herndon, wherein the ground of Federal jurisdiction is diversity of citizenship only (151 U. S. l. c. 138).

The effect of the application of the act of March 13th, 1907, is not to violate the contract set up, if contract there be, but to hold appellee to its terms and put it on the same footing with domestic corporations, which could not resort to the Federal courts on the ground mentioned.

Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. l. c. 257.

The contract protected by this court in the case of American Smelting Co. vs. Colorado, 204 U. S. 103, 114, was one simply limiting the State of Colorado's "power to tax beyond the rate of taxation imposed upon a domestic corporation."

That case disclosed an effort by the State of Colorado, after contracting on a valid consideration (pp. 112-113), to the contrary, to impose unequal, double taxation upon the Smelting Company. (Hammond Packing Co. vs. Arkansas, 212 U. S. l. c. 344.)

No such inequality is presented by the bill in the case at bar. In fact, the bill shows the contrary.

Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. l. c. 257.

On the facts presented in the smelting company case, the State of Colorado had full power to act with respect to the subject matter of the contract made. It did make a contract, it accepted a substantial consideration for that contract.

That a valid consideration is of importance is indicated by the cases of Newton vs. Commissioners, 100 U. S. l. c. 561; Christ Church of Philadelphia vs. Commonwealth, 24 How. 300; Wisconsin vs. Railroad Co., 191 U. S. 379; State vs. Gilmore, 141 Mo. 513. The Smelting Company Case is substantially different, we think, from the case at bar.

The case of the Chicago, Rock Island and Pacific Railway Company vs. Ludwig, Secretary of State, 156 Fed. Rep. l. c. 152, to which reference was made by appellee below, involved the right to revoke appellee's license under the statutes of Arkansas by reason of the removal by appellee of certain cases to the Federal courts. The Arkansas statute is wholly unlike that of Missouri. Appellee by complying with the Arkansas statute became a corporation of Arkansas for all

purposes save that of conferring or divesting Federal jurisdiction.

St. Louis & San Francisco Ry. vs. James, 161 U. S. l. c. 550-551, 562.

This marks the distinction between appellee's license in Arkansas and that in Missouri. This distinguishing feature was set up in the bill (l. c. 153), and discussed in the opinion. (l. c. 158.)

Another difference between this case and that, is that the contract relied upon by appellee there grew out of the very act under which the license was granted, the revocation of which that suit was brought to restrain.

In view of these radical differences, it is not necessary, we think, to discuss the correctness of Judge Trieber's opinion in that case.

The act of 1891 (as amended in 1895), under which appellee took out its license, contains no terms of contract. Under it appellee paid no consideration, secured no contract.

That act was a general law, subject to repeal and amendment.

The revocation of the license does not, of itself, infringe the rights of appellee.

The bill does not allege that such revocation will be followed by a mutiplicity of suits. In such a case as this, no presumption to that effect should be indulged.

Pacific Express Co. vs. Seibert, 44 Fed. Rep. l. c. 315.

Pacific Express Co. vs. Seibert, 142 U. S. 339.

In the case of Schurz vs. Cook, 148 U. S. l. c., 409, it was intimated that the denial of a right to incorporate, alleged to be secured by an antecedent contract, did not raise a question as to the impairment, by such denial of the contract plead, but that might only be done by a denial of the right to use

the property and franchises secured by purchase of a railroad under foreclosure proceedings.

The bill in this case proceeds upon the theory of a contract based upon an acceptance of the act of 1870, by one of appellee's component companies, and that the contract relied upon antedates and exists independent of the license procured by appellee in 1902.

There will be time enough to investigate the existence and scope of the contract set up, when a case is presented, indicating a violation of rights averred to be secured by it. A suit to enjoin the revocation of a license not protected by contract relied upon, raises no question as to the impairment of the obligation of that contract.

There seems to be no good reason for denying the applicability to this case of the decisions in the cases of

Doyle vs. Continental Ins. Co., 94 U. S. 535.

Security Mutual Life Ins. Co. vs. Prewitt, 202 U. S. 246.

Barron vs. Burnside, 121 U. S. ——— as explained in the Prewitt case (p. 253).

So far as the license is concerned, which the bill avers, the Secretary of State threatens to revoke, it appears to be within the scope of the rule laid down in those cases.

XVI.

The opinion of the learned circuit court does not discuss any question presented by the allegations of the bill with respect to Herndon. With the utmost deference to that court, we respectfully suggest that it inadvertently erred in assuming that this case was in all respects like the other cases submitted at the same time with it.

In some, at least, of those cases, the suit against the

Secretary of State was founded upon the actual removal from the State to the Federal court and upon the Secretary of State's threat to revoke the license of the company so removing a case.

The learned circuit court, also, it seems, inadventently quoted the act of 1870 incorrectly.

Since the appeal in this case was taken, John E. Swanger, Secretary of State, has been succeeded in office by Cornelius Roach. A stipulation has been filed, substituting Mr. Roach for Mr. Swanger, as one of the appellants in this case.

For the convenience of the court, we have appended copies of the several acts of the Missouri Legislature to which most frequent reference is made in the bill, and in this brief.

In view of the decisions of this court, applicable to the situation presented by this appeal, we most respectfully suggest that the decree of the circuit court should be reversed, and that court directed to dismiss the bill.

All of which is respectfully submitted.

ELLIOTT W. MAJOR,
Attorney-General of Missouri.
JAMES T. BLAIR,
Assistant Attorney-General of Missouri.
CHARLES G. REVELLE,
Assistant Attorney-General of Missouri,
Counsel for Appellants.

APPENDIX.

ACT OF MARCH 19TH, 1907.

AN ACT to repeal section 1075 of article 2, chapter 12 of the Revised Statutes of Missouri, 1899, relating to "Railroad companies," as amended by the session acts of 1905, at pages 107 and 108, approved April 17, 1905, and to enact a new section in lieu thereof, to be known as section 1075, and relating to railroad companies, with an emergency clause.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That section 1075 of article 2, chapter 12 of the Revised Statutes of Missouri, 1899, as amended by the session acts of 1905, at pages 107 and 108, approved April 17, 1905, be and the same is hereby repealed, and a new section enacted in lieu thereof, to be known as section 1075, and relating to railroad companies, and which shall read as follows:

Section 1075. Every railroad corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, from one point in this State to another point in this State, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junc-

tion of branch railroads of the same system as herein defined, carrying passengers, and at the several stopping places; and shall, at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now or may hereafter be, made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains at such junction or railroad crossings, and shall keep such depot or passenger house or rooms warm, lighted and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal all trains carrying passengers, at the junction of all branch railroads of the same system which said branch railroads are eighteen miles or more in length and at the terminus of which is located any county seat town of any county in this State a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning,

operating or leasing any railroad in this State shall keep all its depots, stations or passenger houses, whether located at the crossing or intersection of other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "Railroad corporations," as used in this act, shall include the term "Railway company and railway corporation."

Sec. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places, constitutes an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage.

Approved March 19, 1907.

(Laws of Missouri of 1907, p. 185.)

ACT OF MARCH 13TH, 1907.

AN ACT to provide for the revoking of the license, right and authority of any foreign or non-resident railway corporation, of whatever kind, to do business from a point in this State to a point in this State, whenever such

corporation shall remove certain suits or proceedings to any Federal court or bring certain suits or proceedings in any Federal court; to provide a penalty on any such corporation for doing, attempting to do, or holding itself out to do business from a point in this State to a point within this State without a license, permit or certificate of authority therefor first had and obtained, or to do such business after its license, permit or certificate of authority has been revoked, and to prevent any such corporation from doing or attempting to do business from a point in this State to a point in this State without first having obtained a license, permit or certificate of authority therefor.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this State, to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the Secretary of State, and its right to do such business shall cease, and the Secretary of State shall publish such revocation in some newspaper

of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State, or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation.

Sec. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in this State to another without a license, permit or certificate of authority therefor first had and obtained from the State of Missouri—to be issued by the Secretary of State—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this State to another point in this State, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the Attorney-General, or the prosecuting attorney of any county in the State in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated

or in the county where it terminated. And the Governor may, whenever he shall deem it necessary, appoint special counsel to assist the Attorney-General or any prosecuting attorney to enforce or carry out the provisions of this act.

Sec. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

(Laws of Missouri of 1907, p. 174.)

ACT OF APRIL 21ST, 1891.

AN ACT to require every foreign corporation doing business in this State to have a public office or place in this State at which to transact its business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees thereon.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign corporation established or maintained in any way for pe-

cuniary profit of its stockholders or members shall engage in any business other than that expressly authorized in its charter, or the law of this State under which it may come, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business. And no corporation incorporated under the laws of any other state, territory or country, doing business in this State, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this State, to the injury or exclusion of any citizen or corporation of this State who is a creditor of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this State, until all of its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished.

Sec. 2. Every company incorporated for purposes of gain under the laws of any other state, territory or country, now or hereafter doing business within this State, shall file in the office of the Secretary of State a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal officer or agent in Missouri of the said corporation shall make and forward to the Secretary of State, with the articles or certificate above provided for, a statement, duly sworn to, of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the State of Missouri; and such corporation shall be required to pay into the treasury of this State, upon the proportion of its capital stock repre-

sented by its property and business in Missouri, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this State. Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this State, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri; and such certificate shall be taken by all courts in this State as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this State, in which event the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this State: Provided, that nothing in this act shall be taken or construed into releasing foreign loan, building and loan or bond investment companies on the partial payment or installment plan from any provisions of law requiring them to make a deposit of money with a proper officer of this State to protect from loss the citizens of this State who may do business with such loan, building and loan or bond investment companies: Provided, that the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; and, provided, further, that the provisions of this act are not intended to and shall not apply to "drummers" or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

Sec. 3. Every corporation for pecuniary profit, formed in any other state, territory or country, now doing

business in or which may hereafter do business in this State, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the Secretary of State, immediately after August 1, of the year 1891, and as often thereafter as he may be advised that corporations are doing business in contravention to this act, to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and the prosecuting attorney shall, as soon thereafter as is practicable, institute proceedings to recover the fine herein provided for, which shall go into the revenue fund of the county in which the cause shall accrue; in addition to which penalty, on and after the going into effect of this act no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort: *Provided*, that the provisions of this section shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; nor to "drummers" or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

Sec. 4. This act does not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to that character of corporations, but apart from the insurance laws, all acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 5. The fact that there is now no law governing foreign corporations, as above provided for, creates an emergency within the intendment of the Constitution;

wherefore this act shall take effect from and after its passage.

Approved April 21, 1891.

(Laws of Missouri of 1891, p. 75.)

ACT OF MARCH 24TH, 1870.

AN ACT to amend chapter sixty-three of the General Statutes, entitled "of railroad companies," so as to authorize the consolidation, leasing and extension of railroads.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Any two or more railroad companies in this State, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement, with the corporate name to be assumed by the new com-

pany, shall be filed with the Secretary of State, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company under such corporate name as may have been adopted; *provided, however*, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; *and provided*, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise. And in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this act, they shall each file

with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

Sec. 2. That the said chapter is hereby amended by adding thereto an additional section, to wit: Section 52. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise aid such company in the construction of its railroad within or without the State, for the purpose of forming a connection of the last mentioned road, with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the State, may extend into the adjoining state, and for that purpose may build or buy or lease a railroad in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state or of the United States, may lease or purchase all or any part of a railroad with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State, and constructed, owned or leased by any other company if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms as may be agreed upon between said companies, respectively; or any railroad company, duly incorporated and existing under the laws of an adjoining state of the United States may extend, construct, maintain and oper-

ate its railroad into and through this State, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this State upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this State concerning railroad corporations as fully as if incorporated in this State; *provided*, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected until a meeting of the stockholders of said company or companies of this State, party or parties to such agreement, whereby a railroad in this State may be aided, purchased, leased, sub-let or affected by such arrangement shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof signed by the president and secretary of said company or companies shall have been filed in the office of the Secretary of State; *and provided further*, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this State, or make arrangements for operating the same as provided in this act, or shall extend its railroad into this State, or through this State, such part of said railroad as is within this State shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this State; and a corporation in this State leasing its road to a corporation of another state shall remain liable as if it operated the road itself, and a corporation of another state being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued, in all

cases and for the same causes, and in the same manner as a corporation of this State might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other; and a corporation of another state being the lessee as aforesaid, or extending its railroad as aforesaid into or through this State, shall establish and maintain an office or offices in this State, at some point or points on the line of the road so leased or constructed, and operated at which legal process and notice may be served as upon railroad corporations of this State.

Sec. 3. Section twenty-two of the chapter aforesaid shall be amended to read as follows: Section 22. Any county court, city council or trustees of any town refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of mandamus, to be sued out of the circuit court of the county.

Sec. 4. Any railroad company in this State shall have the right to take and hold all necessary grounds for depots and side tracks, and if the title thereto cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured, such company may proceed to condemn the same in the same manner and with the same effect as is now provided by chapter sixty-six of the General Statutes of the State of Missouri, entitled "Of the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes," and of any act amendatory thereof.

Sec. 5. Section twelve of the chapter aforesaid is hereby repealed.

Sec. 6. This act shall take effect and be in force from and after its passage.

Approved March 24, 1870.

(Laws of Missouri, 1870, p. 89.)

ACT OF MARCH 2ND, 1869.

AN ACT to authorize the consolidation of Railroad Companies in this State with companies owning connecting railroads in adjoining states.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. That any railroad company organized under the general or special laws of this State, whose track shall at the line of the State connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations, as may be mutually agreed between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed.

Sec. 2. Such consolidation shall not be made, however, unless the terms and provisions thereof shall be approved by a majority of the stock, or the holders of a majority of the capital stock in each of said companies whose stock shall be consolidated, at some meeting called expressly for that purpose, or by the approval of the same by the holders of the same amount of stock in each of said companies, in writing, and signed by them.

Sec. 3. When the terms of said consolidation shall have been agreed upon, as above stated, and approved in one or the other of the modes above set forth, it shall be competent for the board of directors in each of said con-

necting companies to carry the same into effect, and adopt by resolution a new corporate name for the company, which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement and the resolutions of consolidations, and the name adopted for the new company, shall be filed with the Secretary of State, and shall be conclusive evidence of such consolidation, and of the corporate name of the consolidated company; provided, that whenever, at any place on the line of this State, two or more railroads in this State are competing for the business, to or from any railroad in an adjoining state, and a consolidation of either of such competing roads, with the road in an adjoining state, would diminish or prevent such competition, then, and in such case, consolidation shall not be permitted under this act, and in case any railroad in this State shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms; and the same may be enforced by appropriate legislation; *and provided further*, that the State reserves to itself the right to guarantee to any road that may hereafter be built to any such point the right to make a fair contract for the transportation of freight and passengers with such consolidated road, and in case any such railroad company shall consolidate, or attempt to consolidate with a connecting road, contrary to the provisions of this act, any person or party aggrieved may bring action against them, in the circuit court of any county through which such road may pass, which court shall have jurisdiction

in the case, and power to restrain by injunction or otherwise.

Sec. 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this State, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place.

Sec. 5. This act shall take effect and be in force from and after its passage.

Approved March 2, 1869.

(Laws of Missouri, 1869, p. 75.)

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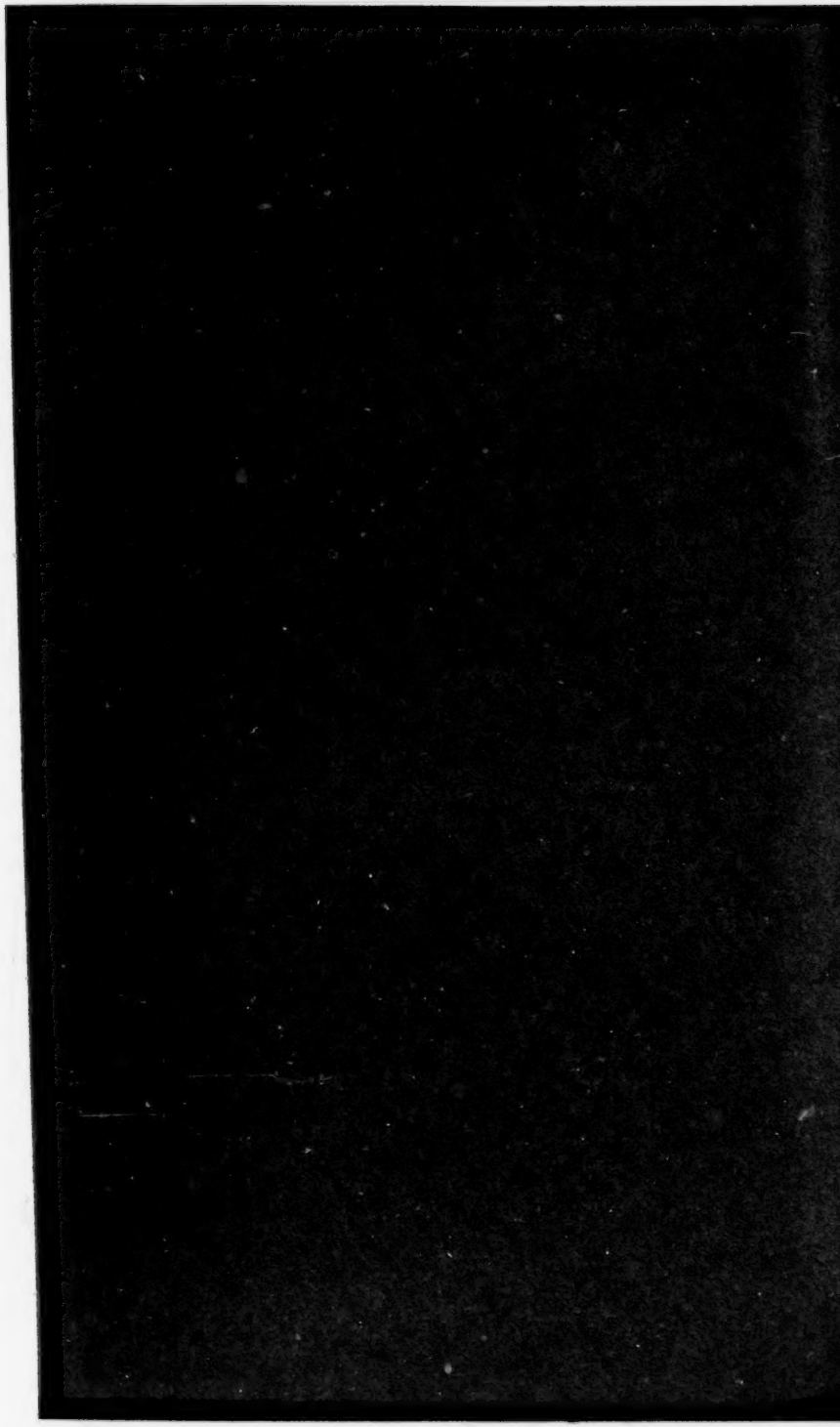

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1909

Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri, *Appellants*,

vs.

The Chicago, Rock Island and Pacific Railway Company, *Appellee*.

No. 150

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Supplemental Brief for Appellee.

Since preparing the original brief in this case, solicitors for Appellee have been furnished with brief of the Appellants, in which some objections are urged to the Bill which were not raised on the argument on the demurrer, in the court below. It seems proper to discuss briefly some of these objections.

I.

The Bill is not Multifarious.

1. The courts have laid down no general rule for determining when a bill is or is not multifarious. Each case must be determined on its own facts and circumstances; and largely, if not wholly, upon the question of convenience. The convenience of the defendants alone is not the final test. The convenience of all the parties, and of the court, is to be considered. No case is a criterion for any other case. The rule, as laid down by Story, is, that the courts "will be governed by those analogies, which seem best founded on general convenience, and will best promote the due administration of justice, without multiplying unnecessary litigation on the one hand, or drawing suitors into needless and oppressive expense on the other." Sto. Eq., Sec. 539.

In the recent case of *Graves v. Ashburn*, 30 Sup. Ct. 108, 110, Mr. Justice Holmes, delivering the opinion of the court, said:

"The objection of multifariousness is an objection of inconvenience."

In the leading case of *Campbell v. Mackey*, 1 Mylne & Craig, 603, 617, where certain of the defendants demurred specially on the ground of multifariousness, Lord Cottenham, said:

"To lay down any rule applicable universally or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the subject are extremely various; and the court in deciding them, seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down an absolute rule."

There is nothing in this record tending to show that either of the defendants has been subjected to any material inconvenience or expense on account of being joined in this suit instead of having been sued separately. They are public officers; the suit has been taken in charge by the Attorney General, and, apparently, neither of the defendants is being put to any trouble or expense whatever.

2. The cause of action stated against the Secretary of State is connected with and grows out of the action against the Prosecuting Attorney. Each is more or less interested in all the matters in controversy. The Prosecuting Attorney threatened the railway company with prosecutions under a state statute, and the Secretary of State threatened the company with forfeiture of its right to do business in the state if it should resort to the jurisdiction of the court below in defending against such threatened prosecutions.

Under such circumstances, it was entirely appropriate, and in no way inconvenient or oppressive to the defendants, or inconvenient to the court, for the rail-

way company to join the defendants in this action. In taking jurisdiction of the complaint against the Prosecuting Attorney the court might well, in the same suit, stay the hand of the Secretary of State, in his threat to punish the complainant for invoking the jurisdiction of that court in this case.

II.

The Objection of Multifariousness comes too Late.

1. Multifariousness is a technical objection, (*Brown v. Guarantee Trust Co.*, 128 U. S. 403, 412) which must be raised, if at all, at the first opportunity, and if not so presented, it is waived.

2. The general allegation in the demurrer, that the Bill does not state a cause which entitles the complainant to any relief, does not raise the objection of multifariousness. Such an objection ought, when it appears on the face of the bill, to be raised by special demurrer.

Billings v. Mann, 156 Mass. 203, 205.

It is said in Street's Federal Equity Practice, Vol. 1, Sec. 936:

"A special demurrer must always be used when the defect to be relied on is one of mere form. It must also be used to get the benefit of any defect not absolutely destructive of the equity of the bill. Multifariousness is a defect of this kind. Hence, in case of a demurrer for mulifariousness, a mere allegation that the bill is multifarious is informal and insufficient. The de-

murrer should state that the bill unites distinct matters upon one record, and it should point out how this is so."

The same rule is laid down in Daniel's Chancery Pleading & Practice, Sixth American Edition, 586, note 5, where it is said:

"And in the case of a demurrer for multifariousness, a mere allegation 'that the bill is multifarious' will be informal: it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing. *Rayner v. Julian,* 2 Dick. 677; 5 Mad. 144, n. (b); *Barber v. Barber,* 4 Drew. 666; 5 Jur. N. S. 1197."

Jackson v. Glos, 144 Ill. 21.

4. But it is said that the objection of multifariousness may be taken by this Court on its own motion. There are extreme cases in which the court on the hearing may, *sua sponte,* raise the objection of multifariousness, and it has been said that this objection might in a like manner be taken even on appeal. But there seems to be no case in which an appellate court has, of its own motion, raised and sustained such an objection. In the leading case of *Oliver v. Piatt,* 3 Howard, 332, 496, Mr. Justice Story, delivering the opinion of the court, said:

"It was well observed by Lord Cottenham, in *Campbell v. Mackay,* 1 Mylne & Craig, 603, and the same doctrine was affirmed in this court, in *Gaines and Wife v. Relf and Chew,* 2 How. 619, 642, that it is impracticable to lay down any rule, as to what constitutes

multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court. But if the objection were tenable, (as we are of opinion it is not), it would be quite too late to insist upon it. The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea, or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity. There is no pretense to say that such is the predicament of the present cause in this court."

5. If this objection was raised by the demurrer, or otherwise, it was not sustained by the Court, and there is nothing in this record indicating that the court below abused its discretion.

III.

The Construction and Effect of the Act of March 19, 1907.

1. The contention of counsel for appellant that the Bill misconstrues the act of March 19, 1907, is not sustained by the allegations of the Bill. It is there, and

still is, contended that the statute has to do with the transfer of passengers, baggage, mails and express freight. The contention of appellee is, that having admittedly provided adequate facilities for such transfers at Lathrop, any additional requirement with respect to its interstate trains, is a direct regulation of interstate commerce, and void. *Atlantic Coast Line v. Wharton*, 207 U. S. 334.

It may be true, that where there are no passengers or things to be transferred, trains need not stop. But the statute, if valid, gives a passenger, or a shipper, the right to demand the stoppage of all trains on independent connecting roads to enable such transfers to be made.

In the case of branch lines of the same system, it is provided that trains shall stop "on a flag or signal." The requirement with respect to independent lines is more rigid. They fail to stop at their peril. One railroad may possibly know, by making inquiry, whether it carries passengers or freight desiring or requiring transfer at the junction point, but it has no means of knowing when it must stop its trains for the transfer to them of passengers or freights from connecting lines. This regulation, with respect to through, fast interstate trains, is, especially where ample facilities are furnished for such transfers, an unreasonable and vex-

atious burden upon, and, therefore, a direct regulation of, interstate commerce.

2. If the defendant Herndon had placed the construction on this statute, which his counsel now advocate, he, perhaps, would not have threatened to harrass the railway company with prosecutions to recover penalties imposed by it. It is said that he has not brought any such suit as threatened. It would be more accurate to say that the record does not show that such suits have been brought, since, as a matter of fact, he has brought a suit with one hundred and twenty-two counts. But it is not contended that any misconstruction of the law by the Prosecuting Attorney can make it unconstitutional. The contention is, that as to complainant's trains which do not stop at Lathrop, the act, properly construed, is a direct regulation of, and an unreasonable burden upon, interstate commerce; and that he may be rightfully enjoined from harrassing complainant with prosecutions to recover penalties whether imposed by the act or not.

3. It is urged, further, that inasmuch as the act of March 19, 1907, was substantially in effect when the complainant came into the state, it cannot now assail it. It is sufficient answer to say that the question whether this act is a direct regulation of commerce as to trains carrying such commerce, does not depend

upon the ownership or control of the trains, or the citizenship of the owners. The objections urged against the statute could just as well be made by a domestic corporation of the state.

IV.

The Authority of the Secretary of State to Revoke the Authority of a Foreign Corporation to do Business does not depend Upon the Result of its Resort to the Jurisdiction of a Federal Court.

1. Appellants urge that, assuming that no case has been made against Herndon, the suit against Swanger cannot be maintained. That does not follow. The power conferred upon the Secretary of State by the act of March 13, 1907, to revoke the authority of a foreign railway corporation to do business, as a penalty for resorting to the jurisdiction of a federal court, does not depend upon the issue of such suit. It is the bringing of a suit in a federal court or the removal of a suit from a court of the state to a federal court which is penalized. The statute does not say that the penalty shall be imposed only where the foreign corporation is successful in the suit.

V.

Appellee's Right to do Business in Missouri.

1. It is urged by appellants that appellee secured no right to do business in Missouri under the act of 1870. In the first place, this contention is inconsistent

with the fourth ground of demurrer assigned by appellants. It is there alleged that it appears by the Bill that complainant has consolidated by purchase or otherwise, with a railroad company organized under the laws of the State of Missouri, and that by virtue of said consolidation it has secured all or a part of the lines of railroad in the State of Missouri, *now owned and operated by said complainant.*

The rightful ownership by the complainant of its lines in Missouri was conceded, but it was contended that by reason of the consolidations and purchases set out in the Bill, complainant had become subject to the jurisdiction of the courts of the State, as if it had been organized under the laws of the State of Missouri, and was not entitled to remove suits instituted in state courts to federal courts.

Having made these admissions, and having tendered these issues for the consideration of the court below, appellants will not be permitted here to withdraw their admission, and present a new issue, founded upon an inconsistent claim of law and fact.

2. Appellants admit that the consolidation of the Chicago and Southwestern Railway, a Missouri corporation with the Iowa corporation of the same name, as set out in the Bill was valid, but claim that it did not change the statues of the former under the laws of Missouri. To the extent that the consolidated company was still a Mis-

souri corporation, the claim is true. But appellants claim that there is a defect in complainant's chain of title, in that the Iowa Southern and Missouri Northern Railroad Company was not authorized to purchase the railway and property of the consolidated Chicago and Southwestern Railway Company at the foreclosure sale referred to in the Bill. (Record, 8.)

That this purchase was fully within the purview of the act of 1874 seems clear, but if it was not, that question cannot be raised here by these appellants, not only because it is not raised by the demurrer, but because it can be raised only by some party directly in interest, or by the state. The right of the Secretary of State, if any, to forfeit the right of appellee to do business in the state arises under the act of March 13, 1907. If he has any power to forfeit this right it is because appellee has brought this suit, and not because its title to some of its property is defective. The Bill shows that appellee owns and operates other railroads in the state which never belonged to the Iowa Southern and Missouri Northern Railroad Company. The sale to the last named company was made many years ago, and about thirty years ago the property so purchased was acquired by consolidation and purchase by the complainant; and there is no claim that during all this time the state has not acquiesced in such purchase of

the property and its improvement and operation by complainant.

In any view that may be taken of the case, the regularity of the title of complainant to a part of its property in Missouri is not presented on this record and cannot be litigated by those defendants.

3. In addition to what has been said under this head, the license to do business in the State for a term ending June 30, 1930, granted to the complainant by the Secretary of State, (Record, 12), is a contract which can only be set aside for a good and sufficient cause. The bringing of this suit is not a sufficient cause.

It is said in the brief for appellants, (p. 42) that no fees or tax was paid to the State for this license. No consideration is necessary to sustain a grant by a state. The Bill, however, alleges that complainant had, before receiving the license, fully complied with the act, and the certificate recites the same fact. The certificate further shows that the capital stock of the company invested in the state at that time was eight million dollars, three million dollars of which was invested before April 21, 1891, the date on which the act took effect. It follows that there was due from the company a license tax on the $5,000,000 invested after the act took effect. The Company could not have "in all respects complied with the requirement of law

governing Foreign Private Corporations" as certified by the Secretary of State, without paying this tax It will be presumed that this officer performed his duty, and that he did not issue the license without collecting the tax which it was his duty to collect. If it has not been paid the Railway Company is still liable for it. The demurrer admits all reasonable presumptions and necessary inferences of facts from the matters stated in the bill. *McClanahan v. Davis*, 8 How. 170.

Section 2 of the Act of April 21, 1891, Laws of Missouri 1891, p. 75, is as follows:

"Every company incorporated for purposes of gain under the laws of any other state, territory or country, now or hereafter doing business within this state, shall file in the office of the secretary of state a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal officer or agent in Missouri of the said corporation shall make and forward to the secretary of state, with the articles or certificate above provided for, a statement, duly sworn to of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the State of Missouri; and such corporation shall be required to pay into the treasury of this state, upon the proportion of its capital stock represented by its property and business in Missouri, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state. Upon a compliance with the above provisions by said corpora-

tion, the secretary of state shall give a certificate that said corporation has duly complied with the laws of this state, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri; and such certificate shall be taken by all courts in this state as evidence that the said corporation is entitled to all the rights and benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this state, in which event the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this state: *Provided,* that nothing in this act shall be taken or construed into releasing foreign loan, building and loan or bond investment companies on the partial payment or installment plan from any provisions of law requiring them to make a deposit of money with a proper officer of this state to protect from loss the citizens of this state who may do business with such loan, building and loan or bond investment companies: *Provided,* that the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies which have heretofore built their lines of railway into or through this state; *and, provided further,* that the provisions of this act are not intended to and shall not apply to "drummers" or traveling salesmen soliciting business in this state for foreign corporations which are entirely non-resident."

It will be observed that this section requires a foreign corporation, applying for a license, to pay into the treasury of the state upon the proportion of its capital stock represented by its property and business in the state, incorporating taxes and fees equal to those required of similar corporations formed within and

under the laws of the state, and that upon compliance with this provision the secretary of state shall give a certificate that the corporations has only complied with the laws of the state, and is authorized to do business therein, stating the amount of its entire capital stock, and of the proportion thereof represented in Missouri. There is a proviso in this section that "the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies which have heretofore built their lines of railway into or through this state." This statute was construed by the Supreme Court of Missouri in *State ex rel. v. Cook*, 171 Mo. 348. In that case the railroad company had, prior to April 21, 1901, built its line of railway into the state, and its proportion of its capital represented by this property was $1,600,000. On February 11, 1902, the company made an application for a license, its proportion of property in the state then having increased to $1,939,000, and offered to pay $1.50, the fee required for the license, without paying any sum as an incorporation tax, claiming it was exempt from paying such tax under the foregoing proviso, its road having been built into the state before the taking effect of the act. The secretary of state demanded the payment of a license tax, and mandamus was brought in the supreme court to compel him to issue the license.

The court held that this proviso only applied to investments made by a foreign railway company prior to the taking effect of the act, and that the company before it was entitled to a license to do business must pay a license tax on its property invested or to be invested in the state subsequent to April 21, 1891, and that the clause requiring the paying of incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this state, required a foreign corporation to do just what a domestic corporation was required to do when it increased its capital or investment in the state.

Section 956, Article 1, Chapter 12, Revised Statutes of Missouri, 1899, p. 322, providing for the payment of fees upon the organization of a corporation, or the increase of its capital stock, is as follows:

"*In creation and organization, what necessary—increase of capital stock fees to be paid.* No corporation, company or association other than those formed for benevolent, religious, scientific, fraternal beneficial or educational purposes, shall be created or organized under the laws of this state, unless the persons named as corporators, shall, at or before the filing of the articles of association or incorporation, pay into the state treasury fifty dollars for the first fifty thousand dollars or less of the capital stock of such corporation or association, and a further sum of five dollars for every additional ten thousand dollars of its capital stock; and no increase of the capital stock of any such corporation, company or association shall be valid or

effectual until such corporation, company or association shall have paid into the state treasury five dollars for every ten thousand dollars or less of such increase in the capital stock of said corporation or association; and it shall be the duty of said corporation or association to file a duplicate receipt of the state treasurer for the payments herein required to be made, with the secretary of state, as is provided by this article for the filing of articles of incorporation or association."

It, therefore, follows that before the complainant was entitled to receive its certificate entitling it to do business in Missouri it was required to pay the secretary of state a fee of $1.50 for the certificate and a tax of $5.00 on every $10,000 of the increase of its investment subsequent to April 21, 1891, or $2500. The license granted by the secretary of state was not, therefore, a mere license revocable at will, but a grant of authority to the railway company to do business in the state for a given period in consideration of the payment of a license tax of $2500 in addition to the fee due the secretary of state for issuing the license.

VI.

The Demurrer Goes to the Whole Bill. If the Bill States any Ground for Equitable Relief, the Demurrer was Properly Overruled.

Vernplank v. Caines, 1 Johns. Ch. 57;
Higginbotham v. Barnet, 5 Johns. 184;
Cochrane v. Adams, 50 Mich. 16;
Stewart v. Masterson, 131 U. S. 151.

In *Merriam v. Holloway Co.*, 43 Fed. 455, Mr. Justice MILLER said:

"The difficulty is that the parties demur to the whole bill, and of course if there is any one thing in the bill that is good,—that is to say, if the bill taken altogether entitles the complainant to some kind of relief,—the demurrer should be overruled."

In *Todd v. Gee*, 17 Ves. 274, Lord Eldon said:

"On those two grounds, therefore, the demurrer would not do: but it cannot be good in part and bad in part; and, going to relief, to which the plaintiff is entitled, it is of no consequence, that there is some relief to which he is not entitled."

Even though it should be found that the Bill does not state a cause for equitable relief against one of the defendants, the demurrer, going, as it does, to the whole Bill, was properly overruled if it states a cause for such relief against the other.

Respectfully submitted.

E. C. LINDLEY,

M. A. LOW,

Solicitors Appellee.

IN THE SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1909

Harry T. Hamlin, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri,
Appellants,

vs.

The Chicago, Rock Island and Pacific Railway Company,
Appellee.

No. 139

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Brief of The Chicago, Rock Island and Pacific Railway Company, Appellee.

E. C. LINDLEY,
H. A. LOW,
Solicitors for Appellee.

Western Printing Company, Topeka.

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1909

Harry T. Herndon, Prosecuting Attorney of Clinton County, Missouri, and John E. Swanger, Secretary of State of the State of Missouri. *Appellants,*

vs.

The Chicago, Rock Island and Pacific Railway Company, *Appellee.*

No. 150

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

Brief of The Chicago, Rock Island and Pacific Railway Company, Appellee.

STATEMENT.

This suit was brought in the Circuit Court of the United States for the Western District of Missouri by The Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under the laws of the states of Illinois and Iowa, against Harry T. Herndon, Prosecuting Attorney of Clinton County,

Missouri, and John E. Swanger, Secretary of State of the State of Missouri, by filing a

BILL OF COMPLAINT.

as follows, formal parts being omitted:

To the Honorable Judges of the Circuit Court of the United States for the Western District of Missouri:

Your orator, The Chicago, Rock Island and Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the states of Illinois and Iowa, and a citizen of each of said states, brings this its bill of complaint against Harry T. Herndon, as Prosecuting Attorney of the County of Clinton, State of Missouri, and a citizen and resident of the said County of Clinton, and State of Missouri, and of the Western District thereof, and John E. Swanger, Secretary of State of the State of Missouri, and a citizen and resident of Sullivan County, and State of Missouri, and Western District thereof, and thereupon avers.

FIRST.

Your orator, The Chicago, Rock Island and Pacific Railway Company is a railway corporation duly organized and existing under and by virtue of the laws of the States of Illinois and Iowa, and a citizen and

resident of said States of Illinois and Iowa, and is, by the laws of the State of Missouri, authorized to do business in the said State of Missouri. It is with its railway engaged in state and interstate commerce, and operates lines of railway in the States of Illinois, Iowa, Minnesota, South Dakota, Nebraska, Wisconsin, Colorado, Arkansas, Tennessee, Louisiana, Oklahoma and Indian Territories, Kansas and Missouri.

Of the said lines of railway, the following, are and for several years last past have been owned and operated by your orator in carrying on its business as a common carrier in transporting both state and interstate business within the State of Missouri:

(*a*) A line of railway beginning on the north line of the State of Missouri near the town of Lineville, lying in the County of Wayne, in the State of Iowa; extending thence southwesterly through the counties of Mercer, Grundy, Daviess, De Kalb, Clinton, and Platte, in the said State of Missouri, to a point on the bank of the Missouri River in said County of Platte, opposite the City of Leavenworth, in Leavenworth County, Kansas.

(*b*) A line of railway beginning at the town of Edgerton Junction, situated upon the foregoing line of railway in the said County of Platte; extending thence in a northwesterly direction through the

counties of Platte and Buchanan in the said State of Missouri, to a point on the bank of the Missouri River in said County of Buchanan opposite the City of Atchison, in Atchison County, Kansas.

(*c*) A line of railway beginning at the town of Altamont situated on the first mentioned line of railway of your orator in the County of Daviess; extending thence in a westerly direction through the counties of Daviess, DeKalb and Buchanan in the said State of Missouri, to the City of St. Joseph in said County of Buchanan and State of Missouri.

(*d*) A line of railway connecting with the last aforesaid line of railway at the said City of Saint Joseph in the said County of Buchanan, and running thence southerly through the said County of Buchanan to the town of Rushville in said County of Buchanan, where it connects with the aforesaid line of railway (b) running from Edgerton Junction, aforesaid, to a point on the Missouri River in the said County of Buchanan, opposite the City of Atchison, Kansas.

(*e*) From Cameron Junction, situated on the first mentioned line of railway of your orator in the County of Clinton, aforesaid, your orator possesses trackage rights, with the right to do all business of a common carrier over the tracks of the Chicago, Bur-

lington and Quincy Railway Company, in a southeasterly direction through the counties of Clinton, Clay and Jackson, in the said State of Missouri, to the City of Kansas City in said County of Jackson and State of Missouri. Said trackage right will exist for a long term of years.

(*f*) From the aforesaid City of Kansas City in the said County of Jackson, State of Missouri, your orator possesses trackage rights, with the right to do all business as a common carrier, over the tracks of the Chicago, Burlington and Quincy Railway Company, in a northerly direction through the counties of Jackson, Clinton, Platte and Buchanan, in the said State of Missouri, to the aforesaid town of Rushville, in said County of Buchanan and State of Missouri. Said trackage rights will exist for a long term of years.

And your orator alleges that the aforesaid line or railway (a), running from the north line of the State of Missouri, near the town of Lineville, lying in the County of Wayne in the State of Iowa, in a southerly direction to a point on the bank of the Missouri River in the County of Platte, opposite the City of Leavenworth in Leavenworth County, Kansas, was constructed and completed in the fall of 1871, by the Chicago and Southwestern Railway Company, and,

as it was completed, possession of the same was assumed by The Chicago, Rock Island and Pacific Railroad Company, a railway corporation organized and existing under and by virtue of the laws of the State of Illinois and Iowa, under an arrangement to operate it on account for the Chicago and Southwestern Railway Company until some permanent arrangement should be made between the two companies. Said the Chicago and Southwestern Railway Company was a consolidated corporation under the laws of Missouri and Iowa, being a consolidation, on September 25th, 1869, of the Chicago and Southwestern Railway Company of Iowa and the Chicago and Southwestern Railway Company of Missouri, said last mentioned corporation being chartered by the Legislature of the State of Missouri on March 3rd, 1869, to construct a railroad located as follows:

"The western terminus of said Chicago and South-western railroad is hereby fixed at a point on the Missouri River, in Platte county, opposite or nearly opposite to the city of Leavenworth, Kansas; and said company may build, maintain and operate a branch railroad from the most practicable point on the main line of said road to the northern boundary line of this state, in the direction of Ottumwa, in the State of Iowa."

Said consolidated coroporation, the Chicago and Southwestern Railway Company, was consolidated, and aforesaid line of railway constructed under and by vir-

tue of a full compliance with an act of the Legislature of the State of Missouri, approved March 2nd, 1869, and an act of the Legislature of the State of Missouri, approved March 24th, 1870, which acts are respectively as follows:

"An act to authorize the Consolidation of Railroad Companies in This State with Companies Owning Connecting Railroads in Adjoining States.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That any railroad company organized under the general or special laws of this state, whose track shall at the line of the state connect with the track of the railroad of any company organized under the general or special laws of any adjoining state, is hereby authorized to make and enter into any agreement with such connecting company, for the consolidation of the stock of the respective companies whose tracks shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining state in which the road is located, with which connection is thus formed.

SEC. 2. Such consolidation shall not be made, however, unless the terms and provisions thereof shall be approved by a majority of the stock or the holders of a majority of the capital stock in each of said companies whose stoock shall be consolidated, at some meeting called expressly for that purpose, or by the approval of the same by the holders of the same amount of stock in each of said companies, in writing and signed by them.

SEC. 3. When the terms of said consolidation shall have been agreed upon as above stated and approved in one or the other of the modes above set forth, it shall be competent for the boards of di-

rectors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of the consolidation; and a copy of the said consolidation agreement and the resolutions of consolidations, and the name adopted for the new company, shall be filed with the secretary of state, and shall be conclusive evidence of such consolidation and of the corporate name of the consolidated company; provided, that whenever at any place on the line of this state two or more railroads in this state are competing for the business to or from any railroad in an adjoining state, and a consolidation of either of such competing roads with the road in and adjoining state would diminish or prevent such competition, then, and in such case, consolidation shall not be permitted under this act, and in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars, without breaking bulk, upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads, on fair and reasonable terms, and the same may be enforced by appropriate legislation; and, provided further, that the state reserves to itself the right to guarantee to any road that may hereafter be built to any such point, the rigth to make a fair contract for the transportation of freight and passengers with such consolidated road, and in case any such railroad company shall consolidate or attempt to consolidate with a connecting road, contrary to the provisions of this act, any person or party aggrieved may bring action against them in the Circuit Court of any county through which such road may pass, which court shall have jurisdiction in the

case, and power to restrain by injunction or otherwise.

SEC. 4. Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations of the company within this state, which may be thus consolidated with one in the adjacent state, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the state, and be entitled to the same franchises and privileges under the laws of this state, as if the consolidation had not taken place.

SEC. 5. This act shall take effect and be in force from and after its passage.

Approved March 2nd, 1869."

"An act to Amend Chapter Sixty-three of the General Statutes Entitled 'Of Railroad Companies,' so as to Authorize the Consolidation, Leasing and Extension of Railroads.

Be it enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the State, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a

meeting of the stockholders regularly called for the purpose or by the approval, in writing, of the persons or parties holding and representing a majority of such stock. A certified copy of such articles of agreement with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the Secretary of State shall be deemed conclusive evidence thereof. The board of directors of the several companies may then proceed to carry out such contract, according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of road is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate, in whole, or in part, when by so doing it will deprive the public of the benefit of competition between said roads. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provision of this act, such consolidation shall be void, and any person or party aggrieved, whether stockholders or not, may bring action against them in the Circuit Court of any county through which such road may pass, which court shall have jurisdiction in the case, and power to restrain by injunction or otherwise. And in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or con-

necting road or roads on fair and reasonable terms, and the same may be enforced by appropriate legislation. Before any railroad companies shall consolidate their roads, under the provisions of this act, they shall each file with the Secretary of State a resolution accepting the provisions thereof, to be signed by their respective presidents, and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each at a meeting of the stockholders thereof, to be called for the purpose of considering the same.

SEC. 2. That the said chapter is hereby amended by adding thereto an additional section, to-wit 'Section 52. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build or buy, or lease a railroad in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad *with all of its privileges, rights, franchises, real estate and other property*, the whole or a part of which is in this state and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon

between said companies respectively, *or any railroad company, duly incorporated and existing under the laws of an adjoining state, or of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state;* provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a ralroad in this state may be aided, purhcased, leased sub-let or affected by such arrangement shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person, or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing and a certificate thereof signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State; and provided further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in the state, or make arrangements for operating the same, as provided in this act, or shall extend its raliroad into this state or through this state, such part of said railroad as is within this state shall be subject to taxation, and shall be subject to all regulations and provisions of law governing railroads in this state, and a corporation in this state leasing its road to a corporation of another state, shall remain liable as if it operated the road itself; *and a corporation of another state being the lessee*

of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, and may sue and be sued, in all cases and for the same causes, and in the same manner as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations, shall discharge the other; and a corporation of another state being the lessee, as aforesaid, or extending its railroad, as aforesaid, into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the roads so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state.

SEC. 3. Section twenty-two of the chapter aforesaid shall be amended to read as follows: 'Section 22. Any county court, city council or trustees of any town refusing to perform any of the duties required of them by this chapter, may be proceeded against by writ of mandamus, to be sued out of the Circuit court of the county.'

SEC. 4. Any railroad company in this state shall have the right to take and hold all necessary grounds for depots and sidetracks, and if the title thereto cannot be secured by agreement with the owners thereof, or if from any other cause the title may not be secured such company may proceed to condemn the same in the same manner and with the same effect as is now provided by chapter sixty-six of the General Statutes of the State of Missouri, entitled: 'Of the appropriation and valuation of lands taken for telegraph, macadamized, graded, plank and railroad purposes,' and of any act amendatory thereof.

SEC. 5. Section twelve of the chapter aforesaid is hereby repealed.

SEC. 6. This act shall take effect and be in force from and after its passage."

Approved March 24th, 1870.

And your orator further alleges that the aforesaid line of railway (*b*) extending from Edgerton Junction situated on the Chicago and Southwestern Railway in the said County of Platte, to a point on the bank of the Missouri River in the said County of Buchanan opposite the said city of Atchison, in Atchison County, Kansas, was constructed and completed by the aforesaid Chicago and Southwestern Railway Company in the year 1872, after the aforesaid Chicago and Southwestern Railway Company, the consolidated corporation of Missouri and Iowa had been consolidated on August 16, 1871, with "The Atchison Branch of the Chicago and Southwestern Railway," a corporation organized on November 25th, 1870, under the laws of the State of Missouri, to construct a railway "from a point on the Chicago and Southwestern Railway in the city of Plattsburg, county of Clinton, in the State of Missouri, to a point on the Missouri River in Buchanan County, Missouri, opposite the city of Atchison and in the State of Kansas."

And your orator further alleges that the Chicago, Rock Island and Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the States of Illinois and Iowa, guaranteed the bonds of the said Chicago and Southwestern Railway Company, and entered into a perpetual agreement

and lease with said roads, and in pursuance thereof took charge of and operated said lines of railway; that the interest on the said bonds was never earned or paid, and under and by virtue of the said agreement with the said The Chicago, Rock Island and Pacific Railroad Company, the mortgages were foreclosed and the property of the said Chicago and Southwestern Railway Company sold at judicial sale, and in strict compliance with the provision of the laws of the State of Missouri, to the Iowa Southern and Missouri Northern Railroad Company, a corporation organized on August 29th, 1876, under and by virtue of the laws of the State of Iowa, for the purpose of "The purchase, improvement, (by construction of a double track and otherwise) maintenance and operation of the railway now known as the main line of the Chicago and Southwestern Railway, etc."

And your orator further alleges that the aforesaid The Chicago, Rock Island and Pacific Railroad Company, organized and existing, as aforesaid, under and by virtue of the laws of the States of Illinois and Iowa, was on the 2nd day of June 1880 consolidated with among other railway corporations of the State of Iowa, the aforesaid railway company, the Iowa Southern and Missouri Northern Railroad Company, a corporation organized and existing, as aforesaid,

under and by virtue of the laws of the State of Iowa, said consolidated corporation becoming a consolidated corporation of the States of Illinois and Iowa, and its name being changed to The Chicago, Rock Island and Pacific Railway Company. Said consolidations was approved by the stockholders of all the constituent companies, and each of the parties thereto did respectively and severally grant, bargain, sell, release, convey, assign, transfer and set over unto The Chicago, Rock Island and Pacific Railway Company, the consolidated corporation thereby created, the several and respective railroads, railroad lands, rights of way, stations, station grounds, lands, lots, bridges, cars, locomotives, rolling stock, tools, machinery, fuel, timber, iron, stone, materials and goods and chattels; and all and singular the several and respective bonds, bills, notes, accounts, demands, money and things in action; and all and singular their several and respective estates, property and effects, real and personal, movable and immovable, wheresoever, howsoever and by whomsoever held; and all and singular the several and respective corporate and other franchises, rights, privileges and immunities; and did mutually agree and declare that the same should from the execution of the said articles of consolidation be held and possessed by the said consolidated corporation, its successors and assigns, forever,

to and for its own use, benefit and behoof forever, to all intents and purposes.

And your orator further alleges that the aforesaid consolidated corporation, The Chicago, Rock Island and Pacific Railway Company, and your orator are one and the same corporation, and that since the said 2nd day of June, 1880, your orator has continuously and does now own, maintain, operate and control all of the aforesaid lines of railway situated within the State of Missouri, used as aforesaid in the transporation of both state and interstate commerce, as heretofore set forth.

And your orator further alleges that the aforesaid lines of railway (*c*) and (*d*) running from Altamont, aforesaid, to Saint Joseph, aforesaid, and from the said City of Saint Joseph, aforesaid, to the town of Rushville, aforesaid, were consolidated and completed during the years 1885 and 1886, by The Saint Joseph and Iowa Railroad Company, a railroad corporation incorporated by the Legislature of the State of Missouri, by acts approved January 22nd, 1857, February 23rd, 1853; February 24th, 1853, November 5th, 1857, and March 19th, 1866.

And your orator further alleges that previous to the construction of the last mentioned lines of railway the Legislature of the State of Missouri had passed

an act approved on March 26th, 1881, which was a subsisting and binding law at the time of said construction, which statute was as follows:

"An Act to Amend Section Seven Hundred and Ninety, Chapter 21, Article 2 of the Revised Statutes of the State of Missouri, Entitled 'Railroad Companies.' Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. Section seven hundred and ninety of the Revised Statutes of the State of Missouri, is hereby amended by striking out the words 'and adjoining,' in the twenty-first line of said section, and inserting in lieu thereof the word 'any'; and such section, as so amended, shall read as follows, viz:

SEC. 790. MAY AID CONSTRUCTION OF OTHER ROADS. Any railroad company heretofore incorporated or hereafter organized in pursuance of law, may at any time, by means of subscription to the capital stock of any other railroad company, or otherwise, aid such company in the construction of its railroad within or without the state, for the purpose of forming a connection of the last mentioned road with the road owned by the company furnishing such aid; or any such railroad company which may have built its road to the boundary line of the state, may extend into the adjoining state, and for that purpose may build, buy, lease or consolidate in the manner provided in the preceding section, with any railroads in such adjoining state and operate the same, and may own such real estate and other property in such adjoining state as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other state, or of the United States, *may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property*, the whole or a part of which is in this state, and constructed, owned or leased by any

other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; *or any railroad company, duly incorporated and existing under the laws of any state of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state, upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state, concerning railroad corporations, as fully as if incorporated in this state;* provided, that no such aid shall be furnished, nor any purchase, lease, sub-letting or arrangements perfected, until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let, consolidated or affected by such arrangement, shall have been called by the directors thereof, at such time and place, and in such manner as they shall designate, sixty days' public notice thereof having been previously given, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the Secretary of State: And provided further, that if a railroad company of another state shall lease a railroad, the whole or part of which is in this state, or make arrangements for operating the same, as provided in this act, or shall extend its railroad into this state, or through this state, such part of said railroad as is within this state, shall be subject to taxation, and shall be subject to all regula-

tions and provisions of law governing railroads in this state; and a corporatoin in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself; and a corporation of another state being the lessee of a railroad in this state, shall likewise be held liable for the violation of any of the laws of this state, *and may sue and be sued, in all cases and for the same causes, and in the same manner, as a corporation of this state might* sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state being the lessee as aforesaid, or extending its railroad as aforesaid into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state.

Approved March 26, 1881."

And your orator further alleges that upon the completion of the aforesaid lines of railway by The Saint Joseph and Iowa Railroad Company, aforesaid, and on the 1st day of July 1885, the said The Saint Joseph and Iowa Railroad Company, entered into a traffic and operating agreement with your orator, The Chicago, Rock Island and Pacific Railway Company, for the operation and control of the said lines of railway; that on the 29th day of December, 1888, your orator The Chicago, Rock Island and Pacific Railway Company purchased of the said The Saint Joseph and Iowa Railroad Company and the said The Saint

Joseph and Iowa Railroad Company, under and in full compliance with the laws of the State of Missouri, granted, bargained, sold, assigned, conveyed and transferred to your orator, The Chicago, Rock Island and Pacific Railway Company, its successors or assigns, all and singular the rights, franchises, powers, privileges and immunities possessed by it, together with all and singular the railway of the said The Saint Joseph and Iowa Railroad Company in the State of Missouri, being the aforesaid lines of railway extending from the said town of Altamont in Daviess County, Missouri, to the said City of Saint Joseph in Buchanan County, Missouri, and from said City of Saint Joseph to the said town of Rushville, in said Buchanan County, Missouri, including, also, all the railway, rights of way, depot grounds and all lands used in connection with the operation and maintenance of said railway, and all tracks, bridges, viaducts, culverts, fences, and other structures and equipment; and that continuously since the said 29th day of December, 1888, up to an including the present time, your orator has been the owner of said lines of railway and has controlled, managed and operated the same during all of said period, and does now own, control, manage and operate all of the aforesaid lines of railway situated within the State of Missouri, as aforesaid, and used

in the transportation of both state and interstate commerce, as heretofore set forth.

And your orator further alleges that it has various other lines of railway within the State of Missouri, which it controlled and owned prior to the 1st day of March, 1907.

And your orator further alleges that of the lines of railway maintained and operated by your orator in the transaction of its business as a common carrier of state and interstate commerce, those from Chicago and from the States of Illinois, Iowa, Minnesota, South Dakota and Wisconsin connect with the aforesaid lines of railway maintained and owned by your orator in the State of Missouri, at the said town of Lineville in said County of Wayne and State of Iowa; and that at the said cities of Saint Joseph and Kansas City in the counties of Buchanan and Jackson respectively in the said State of Missouri, the aforesaid lines of railway maintained and owned by your orator in the State of Missouri, connect and form through lines of railway with the lines of railway maintained and owned by your orator in the States of Kansas, Nebraska, Colorado, Arkansas, Tennessee, Louisiana, Oklahoma and Indian Territories.

And your orator further alleges that having theretofore filed with the Secretary of State of the

State of Missouri a copy of the Articles or Charter of Incorporation, duly authenticated by the proper authority, and having fully complied with all the provisions of an Act of the Legislature of the State of Missouri, entitled:

"An Act to amend section 2 of an act entitled 'An act to require every foreign corporation doing business in this state to have a public office or place of business in this state, at which to transact business, subjecting it to certain conditions, and requiring it to file its articles or charter of incorporation with the Secretary of State, and to pay certain taxes and fees', approved April 21, 1891."

Approved March 11, 1895.

Sam B. Cook then duly elected and acting Secretary of State of the State of Missouri, on the 22nd day of November, 1902, duly issued and delivered to your orator a certificate that it has duly complied with the laws of the State of Missouri, and that it is authorized to do business therein, and that said certificate has never been cancelled or withdrawn, and that it is now in full force and effect, and that it is in the words and figures following, towit:

WHEREAS, the Chicago, Rock Island and Pacific Railway Company, incorporated under the laws of the States of Illinois and Iowa, has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects compiled with the requirements of law governing Foreign Private Corporations.

NOW, THEREFORE, I, Samuel B. Cook, Secretary

of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said Chicago, Rock Island and Pacific Railway Company is from the date hereof duly authorized and licensed to do business in the State of Missouri for a term ending June 3rd, 1930, and is entitled to all the rights and privileges granted to Foreign Corporations under the laws of this State, and that the amount of the capital stock of said Corporation is Seventy Five Million Dollars, and the amount of said capital stock represented in the State of Missouri is Eight Million Dollars, Three Million of which were invested in Missouri prior to April 21st, 1891.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the great seal of the State of Missouri.

Done at the City of Jefferson, this 22nd day of November, A. D., Nineteen Hundred Two.

SAM. B. COOK,
Secretary of State.

(SEAL.)

By J. H. EDWARDS,
Chief Clerk.

SECOND.

Your orator further alleges that this cause arises under the Constitution and laws of the United States, as hereinafter more particularly stated, and your orator further alleges that this action is of a civil nature, and that it involves a controversy between citizens of different states, and that the matter in dispute in said controversy exceeds, exclusive of interest and costs the sum and value of two thousand dollars.

THIRD.

Your orator further alleges that the defendant,

Harry T. Herndon, is the duly elected and qualified Prosecuting Attorney of the County of Clinton in the State of Missouri, and is a citizen and resident of said Clinton County, Missouri, and of the Western District thereof; that the defendant John E. Swanger, is the elected and qualified Secretary of State of the State of Missouri, and a citizen and resident of Sullivan County, and State of Missouri, and of the Western District thereof. Neither of said defendants is a citizen or resident of the State of Illinois nor the State of Iowa.

FOURTH.

Your orator further alleges that at the regular session of the 1907 Session of the Legislature of the State of Missouri, the following law was passed by the said Legislature and approved March 19th, 1907. Said law contained an emergency provision making it effective from and after its passage:

"Be it Enacted by the General Assembly of the State of Missouri, as follows:

SECTION 1. That section 1075 of article 2, chapter 12 of the Revised Statutes of Missouri, 1899, as amended by the session acts of 1905, at pages 107 and 108, approved April 17, 1905, be and the same is hereby repealed, and a new section enacted in lieu thereof, to be known as section 1075, and relating to railroad companies, and which shall read as follows:

SEC. 1075. Every railroad corporation in this state which now is, or may hereafter be, engaged in

the transportation of persons or property, from one point in this state to another point in this state, shall give, public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junction of branch railroads of the same system as herein defined, carrying passengers, and at the several stopping places; and shall, at all crossings, and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or may hereafter be made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers awaiting the arrival and departure of trains at such junction or railroad crossings, and shall keep such depot or passenger house or rooms warm, lighted and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; *and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads,* and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal all trains carrying passengers, at the junction of all branch railroads of the same system which said branch railroads are eighteen miles or more in length and at the terminus of which is located any county seat town of any county in this state a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the

trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning, operating or leasing any railroad in this state shall keep all its depots, stations or passenger houses, whether located at the crossing or intersection of other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the state of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term 'Railroad corporations,' as used in this act, shall include the term, 'Railway company and railway corporation.'

SEC. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places, constitutes an emergency within the meaning of the Constitution; therefore, this act shall take effect and be in force from and after its passage."

Your orator further alleges that at the same session of the Legislature of the State of Missouri, the said Legislature passed the following act, which was approved March 13th, 1907, and became effective June 14th, 1907:

"Be it enacted by the General Assembly of the State of Missouri as follows:

SECTION 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other state, territory or country, and doing business as a carrier of freight or passengers from one point in this state, to another point in this state, under the laws of this state, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this state, shall, without the consent of the other party, in writing, to any suit or proceeding, brought by or against it in any court of this state, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this state to another point in this state shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in some newspaper of large and general circulation in the state, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this state to another point in this state or to do business as a carrier of passengers or freight of any kind from one point in this state to another point in this state at any time

within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this state to a point without this state, or from a point without this state to a point within this state, or from makng what are known as interstate shipments and transportation.

SEC. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in this state to another point in this state, without a license, permit or certificate of authority therefor first had and obtained from the state of Missouri—to be issued by the secretary of state—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this state to another point in this state, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the state of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the attorney-general, or the prosecuting attorney of any county in the state in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney-general or any prosecuting attorney to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed."

And your orator further alleges that both of said defendants are by the aforesaid laws required to do and perform certain special duties with respect thereto.

FIFTH.

Your orator further alleges that on the 1st day of January, 1905, it entered into the agreement heretofore mentioned with the Chicago, Burlington and Quincy Railway Company, and the Chicago, Burlington and Quincy Railroad Company, providing for the trackage rights of your orator over the tracks of the Chicago, Burlington and Quincy Railway Company between Cameron Junction and Kansas City, aforesaid; that by the terms of said agreement your orator acquired the right for a long term of years not only of running its trains over the tracks of the said the Chicago, Burlington and Quincy Railway Company between Cameron Junction and Kansas City, aforesaid, but, with certain exceptions regarding express business, the full and unrestricted right to do all business of a common carrier at any and all points upon and over said joint property and the right to run, operate and manage its trains, locomotives and cars of all classes in the conduct of its business as a common carrier in common with the said the Chicago, Burlington and Quincy Railway Company; that the

town of Lathrop is a town of about 1,000 inhabitants, and is situated in Clinton County, Missouri, upon the aforesaid line of railway running between Cameron Junction and Kansas City; that your orator under and by virtue of the aforesaid agreement of January 1st, 1905, has the right to do and does do all the business of a common carrier at the said station of Lathrop, and there receives and delivers both freight and passengers from or to all points on its system; that your orator for the purpose of caring for its business as a common carrier at the said station of Lathrop stops a morning and an evening passenger train each way every day at said station—No. 261 and No. 201 both westbound arriving at Lathrop at 6:28 A. M. and 6:33 P. M. respectively, and No. 202 and No. 262, both eastbound arriving at Lathrop at 9:50 A. M. and 7:00 P. M. respectively. In addition to the foregoing passenger trains, your orator stops trains No. 984, eastbound, and No. 985, westbound, which are local freight trains regularly carrying passengers, and arriving at the said station of Lathrop at 2:27 P. M. and 9:40 P. M. respectively. Your orator further shows to the Court that it runs a fast through passenger train between Chicago and Fort Worth and Dallas, Texas, No. 211 and No. 212, by means of its connecting carriers in the State of Texas, and a fast through passenger

train between Chicago and the Pacific Coast, No. 203 and No. 204, by means of connecting carriers beyond the Territory of Oklahoma, neither of which stop at the said station of Lathrop to take on or to let off passengers; that said trains No. 211 and 212, which do not stop at the said station of Lathrop, are immediately preceded by the said trains, No. 261 and No. 262, which do stop at the said station of Lathrop, and which are maintained for the express purpose of collecting passengers from local stations and conveying them to nearby station on the lines of railway of your orator where both of said fast through trains Nos. 203, 204, 211 and 212 do stop for the purpose of taking on and letting off passengers.

And your orator further shows to the Court that the tracks of The Atchison, Topeka and Santa Fe Railway Company cross and intersect the tracks of the Chicago, Burlington and Quincy Railway Company at the said station of Lathrop; that the said The Atchison, Topeka and Santa Fe Railway Company runs two trains each way each day upon its line of railway all of which stop at the said station of Lathrop, and all of which make close and direct connection with the aforesaid trains which your orator stops at the said station of Lathrop; that except under unusual circumstances passengers seldom find it convenient to change

from the railway of your orator to that of The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop.

And your orator further shows to the Court that to stop all of its aforesaid trains at the said station of Lathrop for the purpose of letting on and putting off passengers would be a direct, unreasonable and unwarranted interference with the interstate business of your orator, and with the aforesaid trains running between Chicago and Fort Worth and Dallas, and between Chicago and the Pacific Coast, respectively, which trains are maintained primarily for the purpose of transporting the interstate passenger traffic of your orator, and for the carriage of the United States mails.

SIXTH.

Your orator further alleges that the aforesaid act of March 19th, 1907, was passed with the exclusive purpose of providing for and regulating the interchange of freight and passengers at railroad junction points, and for the express purpose of providing more convenient and satisfactory train service upon all railroads situated within the State of Missouri. Your orator further alleges that the facilities for the interchange of passengers at the said station of Lathrop, are amply sufficient to accommodate the public, and that

its train service at said station is both convenient and satisfactory to the public.

Your orator further alleges that its aforesaid trains which stop at the said station of Lathrop afford the public every reasonable opportunity of changing to or from the aforesaid trains of The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop; that the stopping of all the aforesaid trains by your orator at the said station of Lathrop would not practically or materially increase the facilities for the interchange of passengers between the trains of your orator and those of the aforesaid, The Atchison, Topeka and Santa Fe Railway Company at said station; that any requirement by which your orator is compelled to stop its two trains at the said station of Lathrop, so primarily maintained as aforesaid in the transportation of passengers from Chicago to Fort Worth and Dallas and return, and from Chicago to the Pacific Coast and return, would be an unreasonable interference with and an unjust burden upon the interstate commerce of your orator so as aforesaid transported by said trains; that the said trains which your orator does not stop at the said station of Lathrop would not and could not be maintained by your orator but for the transportation of interstate passengers who patronize said trains because of the rapid and unbroken

schedules maintained by said trains; that if said trains are required to stop at all junctions with other railways and there interchange passengers with such other roads, their usefulness as through trains would be destroyed and the interstate business of your orator would be interferred with to an unwarranted extent without any corresponding benefit to the traveling public; and that the aforesaid law of March 19, 1907, so far as it applies to the aforesaid trains of your orator which do not stop at the said station of Lathrop, is a serious burden upon the interstate commerce of your orator so transported by said trains, and an unreasonable, unlawful and unjust interference with said interstate commerce.

And your orator further alleges that that portion of the aforesaid act of March 19th, 1907, which requires all trains carrying passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points is in violation of and contrary to the Act of Congress entitled, "And Act to Amend an Act entitled 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the Power of the Interstate Commerce Commission, approved June 29th, 1906," authorized by that portion of

section eight of the Constitution of the United States giving Congress "the power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes." Your orator shows to the Court that said act to regulate the interstate commerce of the United States applies in terms to and assumes exclusive jurisdiction over all tracks and facilities of every kind used or necessary in the transportation of persons and property moving in interstate commerce, and over all rules and regulations directly and materially affecting the transportation of persons and property moving in interstate commerce. And your orator submits that forasmuch as the Constitution of the United States and the laws passed in pursuance thereof have committed to Congress and its authorized Commission the exclusive power to regulate commerce among the states and to supervise and control the instrumentalities of such commerce and withdrawn the same from every degree of interference on the part of any state or any state law, or official, the said law of March 19, 1907, so far as it requires all trains carrying passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points, interfering therewith, is repugnant to said Constitution and the laws passed in pursuance thereof, and is therefore,

to such extent, null and void.

SEVENTH.

Your orator further alleges that that portion of the aforesaid law of March 19th, 1907, which requires all trains carrying passengers to stop at the junction or intersection of other railroads for the purpose of the interchange of passengers and baggage at such junction points, was not passed as an exercise of the police power of the State of Missouri for the protection of the traveling public from the danger of collisions at such junction points, but solely, as aforesaid, for the purpose of increasing the facilities for the interchange of passengers and baggage, and for the more convenient and satisfactory train service at such junction points. Your orator shows to the Court, however, that on or about the 7th day of April, 1907, an interlocking plant and automatic signal device was completed and put in operation at intersection of the tracks of the Chicago, Burlington and Quincy Railway Company with the tracks of The Atchison, Topeka, and Santa Fe Railway Company at the said station of Lathrop, which provides an absolutely safe method and way for your orator's trains to pass over the tracks of The Atchison, Topeka and Santa Fe Railway Company without stopping. And your orator further alleges that said interlocking plant and automatic signal device

is properly and carefully constructed according to a recognized standard which is in universal use for such purposes throughout the country; that by the use of said interlocking plant and automatic signal device, the trains of your orator are operated over and across the tracks of said The Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop, with greater safety and security to the traveling public when said trains are not stopped at said point of intersection than if said trains were stopped thereat.

EIGHTH.

Your orator further alleges that ever since the passage of the aforesaid law of March 19, 1907, the defendant, Harry T. Herndon, as prosecuting attorney of Clinton County, Missouri, in which county the said station of Lathrop and the aforesaid crossing and junction is located, and particularly since July 21st, 1907, has threatened, and still threatens, to prosecute your orator under said statute for the purpose of recovering the penalty of $25.00 per day for each day since the said 21st day of July, 1907, upon which your orator has operated some of its trains past the said station of Lathrop, and past the junction point with the said The Atchison, Topeka and Santa Fe Railway Company without stopping said trains for the interchange of passengers and baggage. Said Harry T.

Herndon as prosecuting attorney of said Clinton County, proposes, threatens to, and will, unless enjoined herein, put in motion the special provisions of the said law of March 19th, 1907, for the enforcement of the said penalties of $25.00 per day since July 21st, 1907, and, under the pain of these accumulating penalties, which in a short space of time will amount to many thousands of dollars, will, unless enjoined herein, bring suits against your orator to collect said penalties unless your orator sacrifices the facilities it now maintains, and which circumstances compel it to maintain for the proper handling of its interstate business. And your orator shows to the Court that, as heretofore set forth, it has not stopped all of its trains carrying passengers at the said station of Lathrop, in compliance with the aforesaid law of March 19th, 1907. If your orator was compelled to stop all of its trains carrying passengers at the said station of Lathrop, and at other similar junction points in the State of Missouri, in compliance with said law, your orator could not expect to secure the interstate traffic which is now carried on said passenger trains which do not stop at the said station of Lathrop, to carry such interstate traffic said trains were installed and are now maintained; and without such interstate traffic which it now carries on said trains by reason of their rapid

unbroken schedules, said trains could be operated not only without profit, but at a loss and without any return upon the proportion of said investment within the State of Missouri, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law and guaranteeing to all persons the equal protection of the laws.

Your orator submits that while it may, having regard to circumstances, operate a train at a loss or render such service under a fair profit therefor, yet the Legislature of the State of Missouri cannot, and the prosecuting attorney for any county in the said State of Missouri cannot compel your orator to do so, that being the taking of your orator's property for public use without returning compensation therefor, and without due process of law, and it being impossible for said Legislature of the State of Missouri, or the prosecuting attorney for any county in the said State of Missouri to assure to your orator profit on some other service which will answer and make up such deficiency.

NINTH.

Your orator alleges that under its contract with the Government of the United States for the carriage

of United States mails, it is obliged to transport said mail on the aforesaid trains which your orator does not stop at the said station of Lathrop; and that unless the defendant Harry T. Herndon, as prosecuting attorney for Clinton County, Missouri, is restrained herein, he will, by the imposition of said penalties, require your orator to stop said trains; and that said delay consequent upon the stopping of said trains will unreasonably hinder, delay and obstruct the carriage and delivery of the United States mails so carried by your orator, contrary to the Constitution of the United States and the laws passed in pursuance thereof.

TENTH.

Your orator further alleges that the defendant John E. Swanger, as Secretary of State of the State of Missouri, under and by virtue of the alleged authority in him vested, as such Secretary of State of the State of Missouri, by the terms of the aforesaid act of the Legislature of the State of Missouri, approved March 13, 1907, and which becomes effective June 14th, 1907, proposes, threatens to and will unless enjoined herein take such steps as provided in said act last aforesaid to revoke and cancel the certificate granting your orator the right to do business in the State of Missouri, issued by Sam B. Cook, as Secretary of State on the 22nd day of November, 1902, as hereinbefore stated, and to

publish such revocation in some newspaper of general circulation of the state and to do all such further acts as it may be necessary to revoke said license, permit or certificate of authority as are authorized by said Act of the Legislature of the State of Missouri, approved March 13, 1907, should your orator file this, its Bill of Complaint before this Honorable Court, the Circuit Court of the United States for the Western District of Missouri and the St. Joseph Division thereof, the same being a suit or proceeding instituted in a Federal Court of the United States against the defendant Harry T. Herndon and John E. Swanger, citizens of the State of Missouri. Your orator shows to the Court that acting under, by virtue of and fully within the rights and privileges guaranteed unto your orator by the Constitution of the United States and the laws passed in pursuance thereof, it hereby files its said Bill of Complaint before this Honorable Court praying for the aforesaid injunction against the defendant Harry T. Herndon, as prosecuting attorney of Clinton County, Missouri, and a resident and citizen of said County of Clinton and State of Missouri, and against John E. Swanger, as Secretary of State of the State of Missouri and a resident and citizen of said County of Sullivan and State of Missouri. And your orator further alleges that because of the filing of

said Bill of Complaint, and because of any other proceeding which your orator may bring in any Federal Court against any citizen of the State of Missouri, and because of any attempt your orator may make to remove any case into a Federal Court from any State Court of the State of Missouri, and by virtue of the alleged authority attempted to be given the defendant John E. Swanger as Secretary of State of the State of Missouri by the aforesaid law of March 13th, 1907, said defendant John E. Swanger is now threatening to, and unless enjoined herein, by this Honorable Court, will, so far as in his power lays, revoke all authority of your orator to do business in the State of Missouri and take away the right of your orator or its agents to carry passengers or freight between points within the State of Missouri, and to deprive your orator of the use and benefit of its property permanently devoted, under invitation and contract with the said State of Missouri, to the transportation of both state and interstate business within the said State of Missouri.

ELEVENTH.

Your orator further alleges that pursuant to the then existing laws of the State of Missouri, as heretofore set forth, and for the purpose of availing itself of the rights, privileges and immunities therein guar-

anteed and for the purpose of accepting the proffered terms thereof, your orator and its predecessors, after having fully and without reservation complied with the aforesaid laws of the State of Missouri, became authorized to do all of the things enumerated therein. And your orator shows to the Court that in pursuance of said invitation from the State of Missouri and in full compliance with its then existing laws, your orator and its predecessors lawfully and in good faith acquired the lines of railway heretofore mentioned and set forth. And your orator alleges that by reason of the matters and things herein alleged the State of Missouri entered into a valid, binding and subsisting contract with your orator whereby the said State of Missouri guaranteed to your orator the rights, privileges and immunities set forth in the constitution and laws of the State of Missouri, upon the same basis and to an extent identical with the rights, privileges and immunities given by said constitution and laws to railway corporatoins of the state of Missouri, and your orator and its predecessors agreed and undertook to construct and acquire the aforesaid lines of railway within the State of Missouri, and to provide facilities for and fully engage in both the state and interstate business of a common carrier of freight and passengers within the said State of Missouri. And your orator

alleges that it and its predecessors did in good faith, and at the expenditure of thousands of dollars, accept the said invitation and the proffered agreement of the said State of Missouri, and entered said State and built and acquired property devoted entirely to its business as a common carrier of freight and passengers, which property, including not only the many miles of railway heretofore set forth, but depots, station grounds, shops, warehouses, terminals, rolling stock and other equipment necessary to the maintenance and operation of said lines of railway, now located and maintained in the said State of Missouri for such purposes of the assessed value of $3,252,775. And your orator alleges, as aforesaid, that with said property it is engaged in the business of a common carrier in the handling of freight and passengers on these said lines of railway between points in the State of Missouri and from points within the State of Missouri to points outside of said State, and from points outside of the said State of Missouri, to points within said State, and between points in other states and territories, which necessarily requires the carriage of freight and passengers into and through the said State of Missouri.

TWELFTH.

Your orator further alleges that the aforesaid Act

of the Legislature of the State of Missouri, approved March 13, 1907, and effective June 14th, 1907, heretofore set forth, is unreasonable, unjust, oppressive, unlawful, discriminative, confiscatory, null and void, for the following reasons, to-wit:

(*a*) Because said Act is contrary to and violative of Section Two of Article Three of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all controversies and cases arising under the said Constitution of the United States, the laws made under its authority, or between citizens of different States, in that said Act directly and expressly attempts to defeat the jurisdiction of the Courts of the United States of controversies arising under the Constitution of the United States and the laws passed in pursuance thereof, and of controversies between citizens of different states.

(*b*) Because said Act in attempting to confer upon the defendant John E. Swanger as Secretary of State of the State of Missouri, the power to revoke the right of your orator to carry on its business as a common carrier between points within the State of Missouri and to deprive your orator of the use of its property for such purposes, and to forbid thereby the exercise of the rights, privileges and immunities granted to it, as aforesaid, by the Constitution and laws of the

State of Missouri, is in an attempt to relieve the said State of Missouri from the performance of its part of the contract heretofore entered into, as aforesaid, and is contrary to and violative of Section Ten of Article One of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts, in that by the laws of the State of Missouri in full force and effect at the time your orator and its predecessors entered the said State of Missouri, your orator and predecessors were given the same rights, powers, privileges and immunities as domestic railway corporations of the State of Missouri, in that the said Act of March 13th, 1907, in denying to your orator the judicial right it freely and fully accords to domestic corporations of the State of Missouri, of removing proper cases from the State Courts of Missouri to the Federal Courts, or of instituting suits in any Federal Court against a citizen of the said State of Missouri, which denial is an attempt to impair the obligation of the contract entered into, as aforesaid between your orator and the State of Missouri, and is contrary to and violative of Section Ten of Article One of the Constitution of the United States.

(c) Because said Act in attempting to empower and authorize the defendant, John E. Swanger, to pass upon the question as to whether or not suits may

have been removed from the State Courts of Missouri to the Federal Court without the consent of the other party, denies your orator the right of trial by jury, and is therefore contrary to and violative of Act Three of the Constitution of the United States and of Section Twenty-eight of Article Two of the Constitution of the State of Missouri.

(*d*) Because the aforesaid lines of railway of your orator within the State of Missouri form the connecting links between its lines of railway in other States and Territories, and it is necessary to conduct its business as a common carrier of freight and passengers between other States and Territories over its said lines of railway within the State of Missouri, and while said act purports to deny your orator the right to engage in intra-state business only, yet the manifest purpose and the necessary and direct result of the purported forfeiture by the defendant, John E. Swanger, of the right of your orator to do intra-state business between points within the State of Missouri would necessarily and as a direct and intended consequence unreasonably and directly interfere with the interstate business of your orator, and would impose an intolerable and prohibitive burden upon all of such interstate commerce so passing into, from or through the said State of Missouri over the lines of railway so

maintained by your orator. The said Act therefore in attempting to empower and authorize the defendant John E. Swanger, as Secretary of State of the State of Missouri, to deny and take from your orator the right to carry on its business as a common carrier between points within the State of Missouri, is therefore, contrary to and violative of Section Eight of Article One of the Constitution of the United States, which reserves to Congress the right and power to regulate commerce with foreign nations and among the several States and with the Indian Tribes. And your orator submits that forasmuch as the Constitution of the United States and the laws passed in pursuance thereof have committed to Congress and its authorized Commission the power to regulate commerce among the States and withdraws the same from every degree of interference on the part of any State or any State Official, the said Act of March 13, 1907, interfering therewith is repugnant to the Constitution of the United States and the laws passed in pursuance thereof, and is therefore null and void.

(e) Because said Act, unless its enforcement is enjoined herein, affecting as it would not only its intrastate, but its interstate traffic within the State of Missouri, would so unreasonably reduce the annual gross income derived from the operation of your orator's

lines of railway within the State of Missouri, as to become insufficient to permit your orator to operate its property in the State of Missouri without loss, all of which is contrary to and violative of the provisions of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, prohibiting the taking of property without due process of law, and guaranteeing to all persons the equal protection of the laws.

(*f*) Because said Act purporting to give the defendant, John E. Swanger, as Secretary of the State of Missouri, the right arbitrarily to deny your orator the right to do business between points within the State of Missouri and thereby depriving your orator of the use of its property as a common carrier of freight and passengers for hire, is contrary to and violative of Section One of Article Fourteen of the Amendments to the Constitution of the United States, and of Section Thirty of Article Two of the Constitution of the State of Missouri, which provides that no State shall deprive any person of property without due process of law, and that no person shall be deprived of property without due process of law.

(*g*) Because said Act, in denying to your orator, under pain of heavy penalties, the right to remove a case to the Federal Court which may be commenced

in a State Court of Missouri, or the right to institute a proceeding in any Federal Court against any citizen of Missouri, thereby depriving your orator of a right to resort to the Courts of the land in an orderly manner, is contrary to and violative of Section One of Article Fourteen of the Amendment to the Constitution of the United States, which provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

(*h*) Because said Act, in denying to your orator, a foreign railway corporation being now and for many years last past lawfully and properly within the jurisdiction of the State of Missouri, the right of appealing to the Federal Courts for the trial of its rights or the redress of its wrongs, such right being freely and fully accorded to all domestic railway corporations of the State of Missouri and to all other persons within the State of Missouri, without condition or limitation, is contrary to and violative of Section One of Article Fourteen of the Amendments to the Constitution of the United States, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

(*i*) Because said Act in denying to your orator the right to appeal to the Federal Courts for the trial of its rights or the redress of its wrongs except under

the pain of heavy and prohibitive penalties is contrary to and violative of Section Ten of Article Two of the Constitution of the State of Misouri, providing that the courts of justice shall be open to every person and certain remedy afforded for every injury to person or property, and that right and justice should be administered without sale, denial or delay.

THIRTEEN.

Your orator further alleges and shows to the Court that the said Act of March 13, 1907, is inoperative, null and void, in that it is in conflict with the Constitution of the United States and the Constitution of the State of Missouri. Said act provides that the Secretary of State shall arbitrarily and without notice or hearing terminate the right of your orator and other foreign railway companies doing business between points within the State of Missouri, and shall publish such revocation in some newspaper of a large and general circulation in the state, and that thereupon your orator and other foreign railway corporations similarly situated shall not again be permitted or authorized to carry passengers or freight between points within the State of Missouri at any time within five years from the date of such revocation of the cessation of said right to do business between points within the State of Missouri. Said provisions in an arbitrary way

prohibit your orator and other foreign railway companies similarly situated from making any defense to said action of the Secretary of State of the State of Missouri, and prohibit your orator and other foreign railway companies similarly situated from making any showing or assigning any reason why their right to do business between points within the State of Missouri, should not be denied. Said provisions authorize the Secretary of State of the State of Missouri to deny the right of your orator and other foreign railway corporations similarly situated to do business between points within the State of Missouri, without a hearing, advice or consideration. But for said provisions and in ordinary litigation or hearing, if opportunity were offered your orator and others similarly situated, could submit in its defense and in support of its action evidence tending to show at least that even the terms of the said Act of March 13th, 1907, had not been violated. In the State of Missouri to every person and party save and except your orator and other common carriers of like character justice is dispensed in the courts of law freely and without default or denial in pursuance of the fundamental principles of the American Government, and of the Constitution of the United States and of the Constitution of the State of Missouri, and with full and uncircumscribed right to allege

and show in his defense such matters and things as by said provisions are denied to your orator and other like parties.

Wherefore, your orator submits that the said Act of March 13th, 1907, denies to your orator the equal protection of the laws, and deprives your orator and others similarly situated of their property without due process of law, and is repugnant to the Constitution of the United States, and particularly of the Fourteenth Amendment thereof, prohibiting the taking of property without due process of law and guaranteeing to all persons the equal protection of the laws.

FOURTEEN.

Your orator further alleges and shows to the Court that according to the provisions of said Act of March 13th, 1907, effective June 14th, 1907, after which date your orator and its officers and agents became subject to the penalties therein prescribed, if your orator should attempt to remove into the Federal Court a case commenced in the State Court of Missouri, or if your orator should attempt to commence a proceeding in any Federal Court against any citizen of the State of Missouri, the defendant herein, John E. Swanger, as Secretary of State of the State of Missouri, would as he has threatened to do, and as he will do unless restrained herein, attempt to deny the right

of your orator to do business between points within the State of Missouri. And if your orator, its officers and agents should carry or attempt to carry, or should hold itself out to carry passengers or freight of any kind from one point in the State of Missouri to another point in said State, after the defendant John E. Swanger as Secretary of State of the State of Missouri had so arbitrarily declared that the right of your orator to do business between points within the State of Missouri had ceased according to the terms of said act, your orator would be compelled to forfeit and pay to the State of Missouri for each offense a penalty of not less than $2,000 nor more than $10,000 to be recovered in any court of competent jurisdiction by the Attorney General of the State of Missouri or the Prosecuting Attorney of any county in said state in which said alleged offense shall have been committed. And your orator further alleges and shows to the court that the penalties imposed in said Act of March 13th, 1907, for the violation of its provisions are so harsh, unusual and unreasonable as to constrain your orator and other foreign railway corporations subject to the provisions of said act to submit thereto, however illegal the same may be, rather than take the risk of incurring such enormous and numerous penalties as would utterly bankrupt and destroy them, and thus cause a forfeiture

or loss of the entire property by them controlled: that if your orator should refuse to obey the mandate of said act it would before a final determination or adjudication of the question as to its validity could be obtained incur penalties that would exceed the assessed value of its property devoted to the carrying of freight and passengers between points within the State of Missouri.

FIFTEEN.

Your orator further alleges that the said Act of March 13th, 1907, is not only confiscatory of the property of your orator, but that the penalties prescribed for a violation to obey said act are so harsh, unjust, unusual, oppressive and unequal that your orator is thereby denied the equal protection of the law, and is practically precluded from the privilege of ascertaining its rights and challenging the validity of the enactment in the courts of the land. Wherefore your orator charges that the aforesaid act violates the provisions of Section One of Article Fourteen of the Amendments to the Constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.

In consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and can only have relief

in the court of equity where matters of this kind are properly cognizable and relievable, your orator prays:

That the said defedant, Harry T. Herndon, as prosecuting Attorney of Clinton County, Missouri, his deputies, agents and successors in office, may be forever temporarily and permanently restrained and enjoined from enforcing or attempting to enforce the provisions of the act of March 19th, 1907, so far as it relates to the stopping of the trains operated by your orator where the tracks of the Chicago, Burlington and Quincy Railway Company intersect and cross the tracks of The Atchison, Topeka and Santa Fe Railway Company at the station of Lathrop, Clinton County, Missouri, or from enforcing or attempting to enforce any of the penalties prescribed by said statute for failure to observe the provisions of said act or from prosecuting your orator in any manner whatever for a failure to observe the provisions of said act as above specified, or from acting or attempting to act under and by virtue of any powers or rights attempted to be conferred by said legislature of the State of Missouri in said act of March 19, 1907; that the defendant John E. Swanger, as Secretary of State of the State of Missouri, his deputies, agents and successors in office, may be forever temporarily and permanently restrained from enforcing or attempting

to enforce the provisions of said Act of March 13th, 1907, providing for the revoking and cancelling of the certificate granting your orator the right to do business in the State of Missouri whenever your orator shall revoke suits or proceedings to any Federal Court or bring certain suits or proceedings in any Federal Court against any citizen of the State of Missouri; that said Acts of March 13th, 1907, and March 19th, 1907, passed by the 1907 session of the Legislature of the State of Missouri, be declared unconstitutional, uninforcible, and not binding upon your orator. And your orator prays for such other and further and different relief as in equity may be just and equitable.

And your orator further prays that in the meantime and until the hearing hereof, your orator may have a temporary restraining order embracing and including all of the relief herein prayed for, and such restraining order to continue in force until the termination of the hearing for a perpetual injunction and until the further order of this court.

AND MAY IT PLEASE YOUR HONORS, to grant unto your orator a writ of subpœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to said Harry T. Herndon, as Prosecuting Attorney of Clinton County, Missouri, and said John E. Swanger, as Secretary of State of the

State of Missouri, thereby commanding them and each of them on a day certain therein to be named and under a certain penalty personally to be and appear before this Honorable Court, and then and there full, true, direct and perfect answer make to all and singular the premises, but not under oath, answer under oath being expressly waived, and to stand to, perform and abide by such order, direction and decree as may be made against them in the premises.

And your orator will ever pray.

DEMURRER.

To this Bill the defendants below demurred, assigning as grounds therefor the following:

First. That said complainant has not in said bill of complaint made or stated any such cause as doth or ought to entitle it to the relief thereby sought and prayed for from or against defendant, or to any relief whatsoever.

Second. It appears upon the face of complainant's bill of complaint that complainant has an adequate remedy at law.

Third. It appears upon the face of complainant's bill of complaint that this court has no jurisdiction to hear and determine this cause, or to grant any relief therein whatsoever, for the reason that said suit

is in effect a suit against the State of Missouri within the meaning of the Eleventh Article of Amendment to the Constitution of the United States.

Fourth. It appears upon the face of complainant's bill of complaint that complainant is a railroad company organized under the laws of the States of Illinois and Iowa, and that it has since the year 1875, and prior to the year 1907, consolidated by purchase, or otherwise, with a railroad company organized under the laws of the State of Missouri, and that by virtue of said consolidation it has secured all or a part of the lines of railroad in the State of Missouri, now owned and operated by said complainant, and that, therefore said complainant was not entitled, under the provisions of Section 18 and Section 21 or Article XII, of the Constitution of Missouri, and Section 1060 of Chapter 12, Article II, Revised Statutes of Missouri, 1899, to remove any suit instituted against it in the courts of Missouri to the Federal Courts, but that said complainant became and remained, by virtue of said consolidation and the Constitution and statutes of the State of Missouri, subject to the jurisdiction of the courts of Missouri as if said corporation has been organized under the laws of the State of Missouri. (Transcript, pp. 33, 34.)

This demurrer was overruled, and the defendants electing to stand on it, and refusing to plead further, a decree was entered against them as prayed in the Bill. (Transcript p. 47.) From this decree the defendants appealed.

BRIEF.

I.

The Grants Contained in the Several Acts of the Legislature of the State of Missouri Authorizing Foreign Railway Corporations to Buy, Construct, and Operate Railways in that State are, when Accepted, Binding Contracts, the Impairment of which is a Violation of the Federal Constitution, and not mere Licenses Revocable at Will.

Missouri at an early date in railway building, threw down the bars to foreign railway corporations. By the Act of 1869, (Trans. 3) it authorized the consolidation of domestic railroad companies with foreign companies. By section 4 of that act the consolidated company was given the franchises and privileges of the constituent companies.

The Act of March 24, 1870, made liberal provisions for consolidation of foreign with domestic railroad companies, the extension of the lines of foreign companies into the state, and for the purchasing or leasing of the lines of domestic companies by foreign companies. The provisions of Section 2 of the Act of 1870 with respect to the purchase by a foreign railway corporation of the railway and property of a domestic corporation are still in full force and effect, being Section 1060, Chapter 12 of the Revised Statutes of Missouri for 1899, and are as follows:

Any railroad company heretofore incorporated, or hereafter organized in pursuance of law, may, at any time, by means of subscription to the capital stock of

any other railroad company, or otherwise, aid such company in the construction of its railroad within or without this state, for the purpose of permitting a connection of the last mentioned road with the road owned by the company furnishing such aid;..... Any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connecting at a point either within or without this state, upon such terms as may be agreed upon between the companies respectively, or any railroad company, duly incorporated and existing under the laws of any state, or of the United States, may extend, construct, maintain and operate its railroad into and through this state, and for that purpose it shall possess and exercise all the rights, powers and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporation as fully as if incorporated in this state.

The consolidated Chicago and Southwestern Railway Company, whose lines in the states of Iowa and Missouri are now owned by the appellee, The Chicago, Rock Island and Pacific Railway Company, was organized under these acts of 1869 and 1870 (Trans. 3). Afterwards, these lines were sold and conveyed under the provisions of the Act of 1870 to the Iowa Southern and Missouri Northern Railroad Company, a corporation organized under the laws of the State of Iowa.

In June, 1880, the Iowa Southern and Missouri Northern Railroad Company was, under the laws of the states of Illinois and Iowa, duly consolidated with The Chicago, Rock Island and Pacific Railroad Company, a corporation organized under the laws of the states of Illinois and Iowa, the consolidated corporation, being the appellee, The Chicago, Rock Island and Pacific Railway Company. The consolidated Rock Island Company at once, on the 2nd day of June, 1880, took possession of the railways of the constituent companies in Missouri and elsewhere, and has continued to control, maintain and operate the same ever since. (Trans. 8, 9.)

In 1888 the Rock Island Company purchased the railway, rights and privileges of the St. Joseph and Iowa Railroad Company, a Missouri corporation. It also owns other lines of railway in the state of Missouri acquired before March, 1, 1907. (Trans. 11.)

The grants of power and privilege under which the Rock Island Company, at an expenditure of many million dollars, acquired its railways in the state of Missouri, with "all the rights, powers and privileges conferred by the general laws of this state, upon railroad corporations organized thereunder," are about as broad as the legislature could make them. Such grants are not mere licenses revocable at the will of the grantor. They are, when accepted, valid and binding contracts

which cannot be impaired in any substantial way, without the consent of the grantee. No new conditions which would materially interfere with, or obstruct the substantial enjoyment of the rights previously granted can be imposed by the state.

Since the decision of this court in the case of Dartmouth College v. Woodward, 4 Wheat. 518, it has been the settled rule that conditions in the charter of a corporation or in the laws by which it was given permission to enter the state, constitute a contract within the protection of the Constitution of the United States.

In *N. J. v. Yard*, 95 U. S. 104, 114, Mr. Justice MILLER laid down the rule as follows:

> "It has became the established law of this court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action by individuals or corporations, become contracts between them and the state within the protection of a class referred to by the Federal Constitution."

In *N. Y. L. E. & W. Ry. Co. v. Penn.*, 153 U. S. 628, a statute of Pennsylvania permitted a railway company to build into that state but made certain provisions limiting the rates on coal and providing for certain annual payments, refusal to make such payments being a forfeiture of its privileges. The statute further provided that the stock of the railway company equal to the cost of construction in Pennsylvania should be

subject to a state tax in the same manner and at the same rate as similar property in the state was taxed. The state afterwards attempted to levy an annual tax of three mills on the dollar for state purposes, on mortgages, stocks and other evidences of indebtedness, and required the treasurer of corporations, whether incorporated under the laws of Pennsylvania or of any other state, doing business in Pennsylvania, upon the payment of any interest on any script, bond or certificate of indebtedness issued by said corporation to residents of the state and held by them, to assess this tax upon the nominal value of said evidences of debt, and to deduct the amount of the tax from such interest.

In delivering the opinion of the court, holding that this statute impaired the obligation of the contract under which the railway company was authorized to acquire and operate its railroad in Pennsylvania, Mr. Justice HARLAN said:

"To any view which assumes that the state could —so long, at least, as the railroad company performed the conditions of the acts of 1841 and 1846— burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent."

In *Commonwealth v. M. & O. R. Co.*, 64 S. W. Rep. 451, where an Alabama corporation was given legisla-

tive authority to exercise all the privileges, rights and immunities enjoyed by the corporation in the State of Alabama, it was held by the Court of Appeals of Kentucky, that the railroad company could not be compelled to become a corporation of the state of Kentucky. In the course of its opinion the court said:

"Where the legislature grants franchises or privileges to a corporation, without reservation of right to amend or repeal the grant, and the corporation accepts it, and expends money or acquires property rights based thereon, it is not competent for the State to subsequently, by amendment or independent enactment, impose additional conditions upon the privilege of exercising the franchises or using the rights so previously granted."

In 1891, the legislature of the State of Missouri passed an act, section 2 of which requires foreign corporations to file with the Secretary of State copies of their articles of association, and requires them to pay to the state upon the proportion of their capital stock represented by their property and business in Missouri, incorporating taxes and fees equal to those required of similar domestic corporations. Said section further provides:

Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this State, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Missouri; and such certificate shall be taken by all courts in this State as evidence that the said corpora-

tion is entitled to all the rights and benefits of this act and such corporations shall enjoy those rights and benefits for the time set forth in its original charter or articles or association, unless this shall be for a greater length of time than is contemplated by the laws of this State, in which event the time of duration shall be reckoned from the creation of the corporation to the limit of time set out in the laws of this State: Provided, that nothing in this act shall be taken or construed into releasing foreign loan, building and loan or bond investment companies on the partial payment or installment plan from any provisions of law requiring them to make a deposit of money with a proper officer of this State to protect from loss the citizens of this State who may do business with such loan, building and loan or bond investment companies: Provided, that the requirement of this act to pay incorporating tax or fee shall not apply to railroad companies which have heretofore built their lines of railway into or through this State; and, provided, further, that the provisions of this act are not intended to and shall not apply to "drummers" or traveling salesman soliciting business in this State for foreign corporation which are entirely non-resident. Laws of Mo. 1891, P. 75; sec. 1024 R. S. 1899.

Section 4 of this act provides that it shall not apply to insurance companies or corporations of that character.

The Rock Island Company took no action under this law until its articles of consolidation were amended in 1902, increasing its capital stock from $50,000,000 to $75,000,000, when a copy of such amendment was filed with the Secretary of State of the State of Missouri, and such fees as were required of domestic corporations under such circumstances were paid. The

Secretary of State then issued to the Company on the 22nd day of November, 1902, the following certificate in the form required by the act:

WHEREAS, the Chicago, Rock Island and Pacific Railway Company incorporated under the laws of the States of Illinois and Iowa, has filed in the office of the Secretary of State, duly authenticated evidence of its incorporation, as provided by law, and has, in all respects complied with the requirements of law governing foreign private corporations,

NOW, THEREFORE, I, SAMUEL B. COOK, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said Chicago Rock Island and Pacific Railway Company is from the date hereof duly authorized and licensed to do business in the State of Missouri for a term ending June 3rd, 1930, and is entitled to all the rights and privileges granted to foreign corporations under the laws of this State, and that the amount of the capital stock of said corporation is Seventy-Five Million dollars, and the amount of said capital stock represented in the State of Missouri is Eight Million dollars, Three Million of which were invested in Missouri prior to April 21st, 1891.

In Testimony Whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri.

Done at the City of Jefferson, this 22nd day of November, A. D., Nineteen Hundred Two.

SAM B. COOK,
Secretary of State.

(SEAL.) By J. H. EDWARDS,
Chief Clerk.

It will be observed that this statute limits the time for which the corporation is entitled to the rights and benefits of the act to the period set forth in its original charter, unless that shall be for a greater length of

time than is contemplated by the laws of the state, in which event the time of duration is to be reckoned from the creation of the corporation to the limit of time set by the laws of the state; but it may be noted in passing, that there was no such limitation in the Act of March 24th, 1870, under which the appellee acquired its lines in Missouri, and there was then no limit in that state to the duration of a railway charter except that fixed in the charter itself.

Here is an express contract between the state and the railway company that the latter, in consideration of the payment of the incorporation tax, may do business in the state for a specified time. To add to the contract conditions not contained in the original, which impose additional burdens, or which take away substantial rights or privileges, is to impair its obligation, within the meaning of the Constitution of the United States.

This statute was construed by the Supreme Court of Missouri in *State ex rel v. Cook*, 171 Mo. 348, where it was held that a foreign railroad company which had theretofore constructed a portion of its line in that state was entitled to deduct from the proportion of its capital upon which its was required to pay a corporation tax, the cost of the railroad constructed before this act took effect. Respecting the powers granted by the act, the court said:

"The Act of 1891 covers (with the exceptions mentioned) foreign railroad corporations as well as foreign manufacturing corporations, but when the railroad company comes into the State, having complied with the requirements of that act, it becomes immediately clothed with powers and valuable rights, not possessed by corporations of any other kind. It may invade private property to survey and mark out its lines, make and file maps of its route, and thus mark as for its own lands to be taken by condemnation, the power for which is conferred. In this way when it has surveyed its lines, located its route and filed its maps and profiles, it acquires a right, over any other railroad company, to condemn that land and build its road along that route. Thus a substantial right accrues to the corporation extending over all its surveyed and located lines in the State."

With respect to the exemption of the railway company from payment of the incorporation tax upon capital represented by a line already constructed, the court said:

"But, as before observed, the property and business of a railroad company differ from those of all other corporations, and we must consider that peculiarity in this instance. If a corporation of any other character were found doing business here after the Act of 1891 took effect, without having complied with its terms, it would be subject to the penalties imposed by the act, because it was intended by the lawmakers that such corporations, if they did not care to submit to our terms, were free to cease their operations here and return to their homes. But that intention could not apply to a railroad company then owning and operating fifty or sixty miles of railroad in this State. To forbid such a company to continue to transact its business within the State would be to destroy its property. That our Legislature never intended to do."

In saying that corporations of any other character were not entitled to the exemption from payment of the incorporation tax on capital invested before the act became effective, the court probably did not have in mind manufacturing companies which had made substantial investments in manufacturing plants in the state before the passage of the act, and doubtless, referred to corporations which were doing business in the state without having made any substantial investment, and which had no contract with it with respect to the doing of business therein. The opinion shows clearly that the court did not consider the authority conferred by this statute, or any other statute of the state, authorizing railroad companies to do business therein, to be a mere license revocable at the will of the state. It is said that to forbid a railway company to continue to transact its business within the state would be to destroy its property, and that the legislature never intended to do that; and it may be added that it has no power to do that, so long as the company continues to do business in the state in accordance with the terms of the contract under which it was admitted.

In *American Smelting Co. v. Colorado*, 204 U. S. 103, a similar statute was drawn in question. A Colorado statute provided for the admission of foreign corporations to do business in that state upon the payment of certain fees. The statute providing that "such

corporations shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of a like character organized under the laws of this state, and shall have no other or greater powers." Afterwards the legislature of the state passed a law imposing an annual license tax upon foreign corporations doing business in the state, in excess of that imposed upon domestic corporations. The State Supreme Court sustained the latter statute, but this court held it unconstitutional, in that it impaired the obligation of the contract entered into between the state and the corporation which had been admitted to do business before the passage of the statute. Mr. Justice PECKHAM in delivering the opinion of the court said:

"These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them

the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities, in other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent."

This act of 1891 was again construed by the Supreme Court of Missouri, in *So. Ill. & Mo. Bridge Co. v. Stone*, 174 Mo. 1, where the doctrine laid down in *State ex rel v. Cook, supra*, was approved, and it was held that a foreign bridge corporation having complied with the act was entitled to exercise the right of eminent domain to the same extent that a domestic company could have exercised it; and it was held further that the clause in the statute providing that a foreign corporation complying with the act shall have no other or greater powers than a domestic corporation of like character, must be construed as giving such foreign

corporation all the powers of a domestic corporation. Attention was called on page 30 of the opinion to the fact that this statute was adopted from the Revised Statutes of Illinois of 1874, and that this clause had been construed by the Supreme Court of that State to give a foreign corporation complying with its terms, all the powers, and subjecting it only to liabilities and restrictions imposed upon domestic corporations of like character. The Court cites with approval *Stevens v. Pratt*, 101 Ill. 217 and *Academy v. Sullivan*, 116 Ill. 375.

This construction is entirely in harmony with the construction placed upon a similar Colorado statute by this Court in *American Smelting Co. v. Colorado*, *supra*.

II.

The Act of the Legislature of the State of Missouri Providing for Revoking the License, Right and Authority of a Non-resident Railway Company to do Business in the State Whenever it Resorts to a Federal Court, Impairs the Obligations of the Contract with the State Authorizing Appellee to do Business in the State, Takes its Property Without Due Process of Law, and Deprives it of the Equal Protection of the Laws.

This statute is as follows:

SECTION 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other State, Territory or country, and doing business as a carrier of

passengers or freight from one point of this State to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this State in any federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forwith be revoked by the Secretary of State, and its right to do such business shall cease, and the Secretary of State shall publish such revocation in some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation.

SEC. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in this State to another point in

this State, without a license, permit or certificate of authority therefor first had and obtained from the State of Missouri—to be issued by the Secretary of State—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this State to another point in this State, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the Attorney General, or the prosecuting attorney of any county in the State in which such offense shall have been committed; and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the Attorney General or any prosecuting attorney to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

1. This statute impairs the obligation of the contract entered into between the state and the railway company when that company accepted the grant of power contained in the Act of March 24th, 1870, by purchasing the railways which it now owns and operates in the State of Missouri, and violates section 10 of article 1 of the Constitution of the United States, in that it deprives the railway company of a substantial right which it enjoyed under the acts of 1870 and 1891 hereinbefore mentioned.

When the railway company was granted the right to do business in Missouri, it was given the right to bring its charter with it. That charter made it a citizen and resident of the states of Illinois and Iowa, and gave it all the rights possessed by other non-residents of the State of Missouri with respect to the removal of suits from state to federal courts, and with respect to the institution of suits in federal courts. That was a substantial right. This statute, if valid, takes that right away. There was no condition in the contract depriving the railway company of that right or permitting the legislature of the state to make its surrender at any time thereafter a condition precedent to the use and operation of its railroad in the state. The very fact that the Legislature of the State of Missouri has thought the taking away of this right to be of sufficient importance to justify the passage of this statute, shows that the right is, in its opinion, a substantial and valuable one. But the amount of the impairment of the obligation is not material. If there be any, it is sufficient to bring into activity the constitutional provision and the judicial power of this Court to redress the wrong. *Farrington v. Tenn.*, 95 U. S. 679, 683.

On principle, this case cannot be distinguished from Commonweath v. M. & O. R. Co., 64 S. W. Rep. 451, where the legislature of the state of Kentucky had

attempted to do indirectly what the state of Missouri by this statute has attempted to do directly. In the Kentucky case, a foreign railroad company had by the legislature been granted permission to do business in the state. After the railway company had accepted the grant of power and constructed its railroad in Kentucky, the legislature passed an act providing that all foreign railway corporations should become domestic corporations as a condition to the control or operation of any railway within the state. The Court of Appeals of Kentucky held that the legislature having granted the railway company the right to do business in the state, could not subsequently, by amendment or independent enactment, impose additional conditions upon the privileges of exercising the franchises or using the rights so previously granted.

Referring to the fact that by becoming a citizen of the state the corporation would lose its right to resort to the Federal Courts, the Court of Appeals said:

For appellant it is argued that, to fulfill the requirement of the section named, it would be compelled to change its status from that of a foreign corporation to a domestic one. In other words, it would be compelled to become a citizen of Kentucky. One of the advantages now thought to pertain to its nonresidency is the privilege of claiming the jurisdiction of the Federal Courts in certain actions. Others of equal or greater value in fact may readily occur to the mind. But we apprehend that the real question is not to the extent of any change of condition, but

whether there is in fact any change. The imposition of further conditions to be performed by the grantee, other than the police regulations, before it can lawfully use or enjoy the privileges theretofore granted to it, is essentially a change of the contract. . . . If section 841 is applied to appellee, it will be required, in order to continue the use and enjoyment of the privileges granted to it in 1848, to do something in addition to that required by the terms of its grant. It will be compelled to take up the burdens of a citizenship, which it has not hitherto had to bear, and deprive itself of privileges deemed by many, or all similarly situated, to be of considerable pecuniary value. This would be manifest, substantial impairment of the obligation of the State's contract, and is therefore repugnant to section 10, article 1, of the Constitution of the United States."

That part of section 2 of the Act of March 24th, 1870, which confers authority upon a foreign railway company to purchase and operate a railroad in Missouri, is as follows:

. . . or any such railroad company which may have built its road to the boundary line of the State, may extend into the adjoining State, and for that purpose may build or buy, or lease a railroad in such adjoining State and operate the same, and may own such real estate and other property in such adjoining State as may be convenient in operating such road; or any railroad company organized in pursuance of the laws of this or any other State or of the United States, may lease or purchase all or any part of a railroad with all of its privileges, rights, franchises, real estate and other property, the whole or a part of which is in this State and constructed, owned or leased by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this State, upon such terms

as may be agreed upon between said companies respectively.

In these clauses only two conditions are imposed: In the first clause it is required that the purchasing railroad company shall have built its road to the boundary line of the state. In the second clause it is required that the lines of road of the contracting companies be continuous or connected at a point either within or without the state. No other conditions are imposed. It is not contended that the state surrendered the right to make reasonable regulations for the construction, maintenance and operation of any railroad in the state so purchased. But the state did not in this statute, or in any other statute, reserve the right after the railway company had accepted the grant to deprive it of its right to resort to the jurisdiction of Federal Courts. No state legislature can deprive any person of the right to resort in a proper case to the Courts of the United States. *Blake v. McClung*, 172 U. S., 239, 255. *Cowles v. Mercer County*, 7 Wall 118.

In *N. Y. L. E. & W. R. Co. v. Penn.*, 153 U. S. 628, Mr. Justice HARLAN in delivering the opinion of the Court, said:

"The contract in question left unimpaired the power of the State to establish such reasonable regulations as it deemed proper touching the management of the business done and the property owned by the railroad company in Pennsylvania, which did not materially in-

terfere with or obstruct the substantial enjoyment of the rights previously granted. But the fourth section of the act of 1885 is not within that category. It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania. . . . "

The Legislature of Missouri has no more power to deprive a railway company which it has admitted to do business in the state of its constitutional right to invoke the jurisdiction of the Federal Courts than had the Legislature of Pennsylvania to compel a foreign railway company to act, in the state of its creation, as an assessor and collector of taxes due in Pennsylvania from residents of that state.

In *Railway Co. v. Whitton*, 13 Wall. 270, 286, Mr. Justice FIELD, delivering the opinion of the court, said:

"Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal Court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such a case, is not subject to State limitation."

It follows that the railway company having been granted the power to buy railroads in the State of Missouri, with all their privileges, rights, franchises, real estate and other property, the state has no power to afterwards say that it shall not appeal, in a proper case,

to the jurisdiction of the Federal Courts for the protection of its right to properly enjoy and use such property and franchises. The right to appeal to the Federal Courts is given by the constitution and laws of the United States, and no state can lawfully deprive any person or corporation of that right. A state cannot lawfully impose a severe and oppressive penalty for the doing of an act which a corporation has the right to do under the Constitution and laws of the United States and the doing of which the state has no right to prohibit. Penalties may be imposed for the violation of legal obligations, but not for the exercise in a proper manner of rights created by law.

2. This act of March 13, 1907, also denies to appellee the equal protection of the laws guaranteed to it by the Fourteenth Amendment to the Constitution of the United States. By the invitation and permission of the State, it is doing business therein, and is subject to its process at the instance of suitors, as fully as any domestic corporation. Under such circumstances it is entitled to invoke the protection of this clause of the Federal Constitution.

Northwestern National Life Ins. Co. v. Riggs, 203 U. S. 243, 248.

G. C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 154.

This statute, if valid, deprives appellee of the right which it has under the Constitution and laws of

the United States to remove, in a proper case, suits from State to Federal Courts, or to institute suits or proceedings against citizens of Missouri in any Federal Court of competent jurisdiction. This statute does not deprive any domestic corporation of such rights. A Missouri corporation may sue appellee in a Federal Court in Missouri or in the Federal Courts of any other state where jurisdiction can be obtained, but the appellee, if this statute is valid, cannot sue a citizen of Missouri in any Federal Court, on any cause of action whatsoever.

There are many proceedings authorized by the laws of the United States of which Federal Courts have exclusive jurisdiction. This statute deprives appellee of the right to institute any of them against a citizen of the State of Missouri, leaving such proceedings open to domestic corporations. Appellee could not without forfeiting its right to do business in Missouri, and becoming liable for the enormous penalties imposed by the act, file a petition in bankruptcy against a citizen of the State. It would probably be a violation of the act to sue out a writ of error in this Court to review a decision of any State Court where a citizen of Missouri is an adverse party. The statute is a practical nullification of the laws of the United States giving Circuit Courts of the United States original cognizance concurrent with the Courts of the several states of all suits of a civil nature, at common law or in equity,

where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States, or in which there shall be a controversy between citizens of different states, where a citizen of Missouri is an adverse party.

No foreign railway corporation can, without violating this statute, and forfeiting its right to do business in Missouri, sue a citizen of that state in any Federal Court to test the validity of a patent. None of these rights are denied to domestic corporations.

This statute cannot be justified on the ground of classification. Foreign railway corporations which have been admitted to do business in the state upon an equality with domestic corporations, cannot be denied the equal protection of the laws of the state.

Delivering the opinion of the court in *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 71, Mr. Justice HARLAN said:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory in which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

M. Justice FIELD, delivering the opinion of the

court in *M. & St. L. Ry Co. v. Beckwith*, 129 U. S. 26, 28-29, said:

"And first, as to the alleged conflict of the law of Iowa with the clause of the Fourteenth Amendment ordaining that no State shall deny to any person within its jurisdiction the equal protection of the law. That clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition. Equality of protection implies not merely equal accessibility to the Courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

A law of Vermont attempted to discriminate between agents representing foreign and domestic companies. The Supreme Court of that state in *State v. Cadigan*, 50 Atl. Rep. 1079, 1081, holding the statute unconstitutional, said:

"No State shall 'deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' Const. U. S., Ament. 14, sec. 1. To deprive one of the right to labor and transact business is to deprive him of his liberty, and also of his property. To hedge the privileges about with conditions and exactions for one class which do not exist for others is to deny to the former the equal protection of the laws; and when the classification is based upon a distinction wholly fanciful or arbitrary, having no possible reasonable connection with any proper purpose to be served by the enactment, it is unconstitutional and void. The equal protection of the law means 'the protection of equal laws.'"

The extreme penalties imposed by this statute

upon a foreign railway company doing intrastate business after having violated its provisions, deprive it of the equal protection of the laws. For a violation of this statute the appellee would be subjected to a fine of from $2,000 to $10,000 for every shipment made or every passenger carried between points within the State of Missouri, and a like fine for every time it held itself out to carry such freight or passengers.

It is alleged in section 14 of the Bill:

"And your orator further alleges and shows to the court that the penalties imposed in said Act of March 13th, 1907, for the violation of its provisions are so harsh, unusual and unreasonable as to constrain your orator and other foreign railway corporations subject to the provisions of said act to submit thereto, however illegal the same may be, rather than take the risk of incurring such enormous and numerous penalties as would utterly bankrupt and destroy them, and thus cause a forfeiture or loss of the entire property by them controlled; that if your orator should refuse to obey the mandate of said act it would before a final determination or adjudication of the question as to its validity could be obtained incur penalties that would exceed the assessed value of its property devoted to the carrying of freight and passengers between points within the State of Missouri."

The demurrer admits the truth of those allegations.

In delivering the opinion of the court in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S., Mr. Justice BREWER said:

"Do the laws secure to an individual an equal protection when he is allowed to come into Court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty of such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? . . . It is doubtless true that the State may impose penalties such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented. But when the Legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the Courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws."

This language was quoted with approval by Mr. Justice PECKHAM in delivering the opinion of the court in *ex parte* Young, 209 U. S. 123, 146, where it was held that a statute of Minnesota was unconstitutional, in that its enormous penalties deprived a railway company of the equal protection of the laws and took its property without due process of law. In the course of the opinion in this last case it was said:

"If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. *Chicago etc. Railway Co. v. Minnesota*, 134 U. S. 418. A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as works

an abandonment of the right rather than face the conditions upon which it is offered or may be obtained, is also unconstitutional. It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights."

In *Barbier v. Connolly*, 113 U. S. 27, 31, Mr. Justice FIELD in delivering the opinion of the court, laid down the following comprehensive rule respecting the application of the Fourteenth Amendment:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

If this language correctly states the purpose and extent of the equal protection clause of the Fourteenth Amendment, this Act of March 13, 1907, is unconstitutional, beyond all question. If a State cannot give a preference in litigation to its own citizens over those of other States (*Blake v. McClung*, 172 U. S. 239, 254-256), it necessarily follows that a State cannot deny to a foreign railway corporation, authorized and invited to purchase and operate railways in the State, access to the Courts of the land when such right is fully and freely given to every person and to all other foreign corporations, as well as to domestic corporations, in like litigation.

The equal protection clause of the Fourteenth Amendment will not permit, under the guise of classification, any such arbitrary and unreasonable division into classes. No greater burdens can be laid upon one person or corporation in the same calling or condition and under the same circumstances, than is at the same time imposed upon other persons or corporations in like calling or condition and under the same circumstances; and a law which singles out foreign railway corporations lawfully doing business in the State for a restrictive regulation which is not made applicable to other persons or corporations, resident or non-resident, under like conditions and circumstances, denies

to such foreign corporation the equal protection of the laws, and is unconstitutional and void.

In *Home Insurance Co. v. Morse*, 20 Wall. 445, Mr. Justice HUNT said:

"A corporation has the same right to the protection of the laws as a natural citizen, and the same right to appeal to all the courts of the country. The rights of an individual are not superior in this respect to that of a corporation."

There are cases in which it has been held that before resorting to the injunctive jurisdiction of the courts, the reasonableness of the statute complained of should be tested by actual experience, but this is not such a case. The validity of this statute can only be tested by violating it. The extreme penalty is imposed for one violation. By bringing this suit to test the constitutionality of the statute, the appellee, if the statute is valid, has already subjected itself to penalties so enormous as to bankrupt it. The imposing of such enormous penalties as a result of an unsuccessful effort to test the validity of the statute, renders it unconstitutional on its face. *Exparte* Young, 209 U. S. 123, 148.

3. The right conferred upon appellee by the Acts of March 24, 1870 and March 11, 1895, to do business in the State is property, within the meaning of the Fourteenth Amendment, and that property right cannot be substantially impaired, or taken away except

by due process of law. Appeal to the jurisdiction of the courts of the United States for the protection of that property is one of the processes of law which appellee has the constitutional right to invoke.

The Act of March 13, 1907, by reason of the enormous penalties imposed for an unsuccessful effort to test its validity, as well as by reason of the arbitrary power confired upon the Secretary of State, without a hearing, to revoke the license of appellee to do business within the state, takes its property without due process of law.

Due process of law means law in the regular course of administration through courts of justice (2 Kent. Com. 13). It requires notice, hearing and judgment. (*Bertholf v. O'Reilly*, 74 N. Y. 519.)

Section 10 of Article II of the Constitution of Missouri, provides that:

"The courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice should be administered without sale, denial or delay."

And section 30 of the same article provides:

"That no person shall be deprived of life, liberty or property, without due process of law."

Yet the legislature of the State attempts to shut the courts of the United States to foreign railroad corporations in cases or proceedings in which a citizen

of the state is an adverse party, leaving them open to citizens and domestic corporations of the State; and to prevent foreign railroad corporations from entering the courts of justice established by the United States by imposing harsh and unreasonable penalties for invoking their protection.

The Act of March 13, 1907, gives the Secretary of State arbitrary power, without hearing, and with no right of appeal, to deprive a foreign railroad company of the right to use its property in the state in intra-state business, whenever he thinks it has violated this statute. And after he makes public his decree, the unfortunate railroad company is deprived of the use of its property for that purpose for five years, without notice, hearing or judgment. The decision of the Secretary of State, so far as this statute is concerned, is final. No court is given jurisdiction to review his action. He is clothed with arbitrary power to destroy, with the stroke of a pen, property worth millions of dollars.

Due process of law requires that when the property of a person or corporation is to be taken, there must be notice of the proceeding, and an opportunity to be heard and to offer proof.

Londoner v. Denver, 210 U. S. 373, 385.

The statute only prohibits the removal by a foreign railroad corporation of cases from State to Federal

Courts, or the institution of suits or proceedings by such corporations in a Federal Court against a citizen of the State, without his consent. Whether such consent has been given is, of course, a question of fact which must be passed upon by the Secretary of State before he is authorized to revoke the license of a foreign railroad corporation to do business. This statute makes no provision for any notice to the railway company of the proposed action to forfeit its right to do business, affords it no right to offer testimony or to be heard upon any question of fact or law involved.

The State cannot give its Secretary of State purely personal and arbitrary power to take the property of a person or corporation, or to forfeit its right to use that property.

In *Wynehamer vs. People*, 13 N. Y. 378, 392, Judge Comstock, delivering the opinion of the court said:

"No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land,' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges or property, leads to a simple absurdity. The Constitution would then mean, that no person shall be deprived of his property or rights, unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take

them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the State. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be created by a legislative act which aims at their destruction. Where rights of property are admitted to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to execute the sentence. If this is the 'law of the land,' and 'due process of law,' within the meaning of the Constitution, then the Legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the Constitution in the same category with liberty and life. . . .

It is plain, therefore, both upon principle and authority, that these constitutional safeguards, in all cases, require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed."

In *Hagar v. Reclamation District*, 111 U. S. 701, 708, Mr. Justice FIELD said:

"It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity

to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In this discussion, no attempt has been made to distinguish the cases where this Court has held that the licenses of certain transitory corporations, licensed, temporarily, to do business in a state, may be revoked on account of the removal of cases from State to Federal Courts. The distinction between such cases and this, is so manifest as to need no discussion. This distinction was pointed out by Mr. Justice BREWER in *Monongahela Navagation Co. v. United States*, 148 U. S. 312, 343, 344:

"Another contention is this: First, that the grant of right to the Navigation Company was a mere revocable license; secondly, that, if it was not, there was a right in the State to alter, amend or annul the charter; and, thirdly, that there was, by the 18th section thereof, reserved the right at any time after twenty-five years from the completion of the improvement to purchase the entire improvement and franchise by paying the original cost, together with six per cent interest thereon, deducting dividends theretofore declared and paid. . a provision changed by section 8 of the act of June 4, 1839, so as to require a payment of the expenses incurred in constructing and making repairs, with eight per cent per annum interest. But little need be said in reference to this line of argument. We do not understand that the Supreme Court of Pennsylvania has ever ruled that a grant like this is a mere revocable license. The cases referred to by

and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "railroad corporations," as used in this act, shall include the term "railway company and railway corporation."

The record does not show how many passenger trains operated by the Burlington Company over this line, stopped at the town of Lathrop, but it may be assumed that it complies with the requirements of this statute, by furnishing sufficient accomodations for the transportation of passengers, baggage, mails and express to and from this junction point.

The record shows that the appellee stops an evening and a morning passenger train, each way, at Lathrop daily, and that it also stops at that point two local freight trains which carry passengers. The Atchison, Topeka and Santa Fe Railway Company runs two trains each way past this junction point, all of which stop at Lathrop, making close and direct connec-

tion with the trains of the appellee which stop at the station, and that except under unusual circumstances passengers seldom find it convenient to change from the trains of the appellee to those of the Atchison, Topeka, and Santa Fe Railway Company at Lathrop. It is alleged in the sixth paragraph of the Bill that facilities for the exchange of passengers at Lathrop are amply sufficient to accomodate the public, and that the train service of the appellee at said station is both convenient and satisfactory to the public, and that the trains of the appellee which stop at Lathrop afford the public every reasonable opportunity for changing to or from the trains of the Atchison, Topeka and Santa Fe Railway Company, and that the stopping of all its trains at Lathrop would not practically or materially increase the facilities for the interchange of passengers between the trains of appellee and the Atchison Company.

It is shown in the fifth paragraph of the Bill that appellee runs a fast, through passenger train each way between Chicago and Ft. Worth, Texas, and another like train each way between Chicago and the Pacific Coast, neither of which stops at Lathrop to take on or let off passenger; that the Ft. Worth trains No. 211 and No. 212, which do not stop at Lathrop, are immediately preceded by trains No. 261 and No. 262, which do stop there, and which are maintained for the express

purpose of collecting passengers from local stations and to convey them to nearby stations where all of said fast, through trains do stop for the purpose of taking on and letting off passengers; that to stop all of its trains at Lathrop for the purpose of letting on and off passengers would be a direct, unreasonable and unwarrantable interference with its interstate business; that the trains which appellee does not stop at Lathrop would not, and could not be maintained but for the transportation of interstate passengers, who patronize these trains because of the rapid and unbroken schedule maintained by them; that if said trains were required to stop at all junctions with other railways, and there interchange passengers, their usefulness as through trains would be destroyed, and the interstate business of appellee would be interfered with to an unwarranted extent, without any corresponding benefit to the traveling public; that without such interstate traffic which is now carried by said trains by reason of their rapid, unbroken schedules, said trains could not be operated without loss, and that to require such trains to stop at Lathrop would be a taking of the property of appellee without due process of law; and that the Act of March 19, 1907, so far as it applies to the said trains which do not stop at Lathrop, is a serious burden upon the interstate commerce transported by the said trains, and an

unreasonable, unlawful and unjust interference with said interstate commerce, and in violation of the act to regulate commerce, and of the provision of the Constitution of the United States giving Congress power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.

In the ninth paragraph of the Bill it is shown that the stopping of said trains at Lathrop will unreasonably hinder delay and obstruct the carriage and delivery of United States mails carried under contract with the United States.

At the point of crossing there is maintained an interlocking plant, rendering it unnecessary to stop trains at the railroad crossing at Lathrop, and trains which do not stop are operated over and across the tracks of the Atchison Company with greater safety and security to the traveling public than those which do stop.

The Bill shows that appellant, Harry T. Herndon, as Prosecuting Attorney of Clinton County, Missouri, was at the time of the commencement of this suit, threatening, and ever since the 21st day of July, 1907, had been threatening to prosecute appellee under the Act of March 19, 1907, for the recovery for the benefit of the school fund of this said county, of the penalty of twenty-five dollars per day imposed by that statute for failure to stop passenger trains at junction points.

This statute is void on its face. In requiring that all trains carrying passengers stop at the junction or intersection of other railroads, this statute is an unreasonable and unwarranted interference with interstate commerce. The legislature in passing this statute was not content to provide that ample facilities and accommodations should be provided at junction points for the exchange of local passenger traffic; it attempted to regulate not only such traffic, but the interstate traffic passing such junction points. It is beyond question that a statute which requires every passenger train, without regard to their number or the facilities afforded for local traffic, to stop at specified points is a regulation of interstate commerce and not a reasonable police regulation.

This question has been frequently before this Court. In *Illinois Cent. R. Co. v. Ill.*, 163 U. S. 142, an Illinois statute providing that all regular passenger trains should stop at all county seats a sufficient length of time to receive and let off passengers, was held to be an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States. In the course of the opinion it was said:

> The State may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini

within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States.

The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the State can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic. *Railroad Co. v. Richmond*, 19 Wall. 584, 589; *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 334; *Smith v. Alabama*, 124 U. S. 465.

It may well be, as held by the Courts of Illinois, that the arrangements made by the company with the Postoffice Department of the United States cannot have the effect of abrogating a reasonable police regulation of the State. But a statute of the State, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation."

In *Gladson v. Minnesota*, 166 U. S. 427, a statute of Minnesota requiring all regular passenger trains to stop at county seats was held valid since it excepted from its operation all interstate and transcontinental trains.

In *L. S. & M. S. Ry. Co. v. Ohio*, 173 U. S. 285, where a statute of Ohio required three regular passenger trains each way to stop at stations containing over 3,000 inhabitants, it was held that the statute was not an unreasonable interference with interstate commerce since the law did not apply to all trains, or any particular kind, but left the Railway Company free to operate such trains as it saw fit without stop-

ping them at county seats.

In *Cleveland, C., C. & St. Ry. Co. v. Illinois*, 177 U. S. 514, it was held that an Illinois statute requiring that all regular passenger trains stopped at county seats a sufficient length of time to receive and let off passengers, was an unconstitutional interference with interstate commerce. This case was distinguished from the Ohio case, supra, on the ground that the Ohio statute only required that three regular passenger trains should stop at every station containing 3,000 inhabitants, leaving the company at liberty to run as many through passenger trains, exceeding three per day, as it choose, without restriction as to stopping at particular stations. "In other words," as it was said, "It left open the loophole which the State of Illinois has effectually closed." The same is true of this Missouri statute. Every loophole is effectually closed.

In delivering the opinion of the court in this last case Mr. Justice BROWN said:

"The question broadly presented in this case is this: Whether a State statute is valid which requires every passenger train, regardless of the number of such trains passing each way daily and of the character of the traffic carried by them, to stop at every county seat through which such trains may pass by day or night, and regardless also of the fact whether another train designated especially for local traffic may stop at the same station within a few minutes before or after the arrival of the train in question?"

Conceding that the State may rightfully provide reasonable regulations for the transfer of passengers at junction points, for the same reason that it may require that reasonable facilities for the accommotion of intrastate passenger traffic be afforded at every railroad station in the state, still the State has no more right to make an unreasonable or burdensome regulation with respect to facilities for the transfer of passengers from one railroad to another, than it has to make unreasonable and burdensome regulations for the accommodation of passengers at local stations. The power of the State in each case is the same, and it is subject to the same limitations. The statute, therefore, which requires that all trains, without regard to their character, or the facilities provided for the transfer of passengers at junction points, stop at such points for that purpose, is as objectionable as one which requires that all passenger trains, without qualification, be required to stop at county seats, or at other specified points.

As applied to the admitted facts of this case, this statute is unconstitutional. It is shown by the Bill, and admitted by the Demurrer, that a sufficient number of passenger trains are stopped at Lathrop to accommodate all local demands, and that the facilities for the interchange of passengers at that point are ample to care for all the business offered, both local and inter-

state; that only under exceptional circumstances is there any interchange of passengers at that point. To require the stoppage of every fast express train of the Company, doing an interstate business, to accommodate exceptional and infrequent conditions, is an unreasonable interference with interstate commerce. The settled rule of this Court, is that after all local conditions have been reasonably provided for, railways may rightfully adopt special provisions for through traffic, and that legislative interference therewith is an unreasonable and unlawful interference with interstate commerce.

In *Cleveland, C., C. & St. L. Ry. Co. v. Illinois*, 177 U. S. 514, Mr. Justice BROWN in the course of the opinion said:

> We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think that they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it and local legislation ought not to stand in the way of it.

In *Mississippi R. R. Com. v. Illinois Cent. R. Co.*, 203 U. S., 335, it was held that an order of the Mississippi Railroad Commission requiring that certain through trains be stopped at a point where it was shown by the Bill that the accommodations afforded at that station by other trains provide by the company sufficiently accommodated the traveling public at that point, and that to require the trains in question to stop would imperil the ability of the railway company to comply with its contract with the United States for the carriage of mails, and embarrass its interstate traffic, was an unwarrantable interference with interstate commerce, and void.

Mr. Justice PECKHAM in delivering the opinion of the court, after reviewing former decisions of this court on this subject, and laying down the rule that where inadequate facilities are furnished, the stoppage of interstate trains may be compelled, said:

"But if the company has furnished all such proper and reasonable accommodation to the locality as fairly may be demanded, taking into consideration the fact, if it be one, that the locality is a county seat, and the amount and character of the business done, then any interference with the company (either directly by statute, or by a railroad commission acting under authority of a statute) by causing its interstate trains to stop at a particular locality in the State, is an improper and illegal interference with the rights of the railroad company, and a violation of the commerce clause of the Constitution. . . . . .

The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a State or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

In *Atlantic Coast Line v. Wharton*, 207 U. S. 328, an order of the Railroad Commission of South Carolina, requiring the railroad company to stop a through fast train at a local station in that state, was held to be an unreasonable interference with interstate commerce, on the ground that the railway company had furnished reasonable accommodations at the station in question.

In considering the question of reasonable facilities, Mr. Justice PECKHAM in delivering the opinion of the court, said:

"The term 'adequate or reasonable facilities' is not in its nature capable of exact definition. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost. . . . The demand at Latta by people desiring to go to the termination of the road, either at New York or Tampa, would naturally be small. Some of the plaintiff's witnesses said that the demand for transportation at Latta was large, or quite large, and the inconvenience great, but a further examination of these witnesses showed that in specific details there was much lacking and instances of inconvenience were really somewhat limited. But assuming that the number actually inconvenienced by the want of fast trains was 'quite large,' as said by some witnesses, it is perfectly evident the number would be small compared with the inconvenience of the much larger number of through passengers resulting from the stoppage of these trains at Latta and other similar stations in the State.

To stop these trains at Latta, and other stations like it, which would bring equally strong reasons for the stoppage of the trains at their stations, would wholly change the character of the trains, rendering them no better in regard to speed than the other trains, 39 and 40, and would result in the inability of what had been fast trains to make their schedule time, and a consequent loss of patronage, also the loss of compensation for carrying the mails, which would be withdrawn from them, and the end would be the withdrawal of the trains, because of their inability to pay expenses. All these are matters entitled to consideration when the question of convenience and adequate facilities arises.

There is no contradiction in the testimony that the company desires, so far as is fairly possible, to pay as much attention to the local demands as to the 'through' claims."

This statute cannot be upheld as a reasonable exercise of the admitted police power of the state to make regulations for the safe passage of the trains of one company across the railroad of another, by requiring that, in the absence of other adequate safeguards, such trains shall come to a stop before crossing.

The manifest purpose of the statute is to provide for the transfer of passengers, baggage, mails and express freight at junction points. It does not provide that the trains of one company shall stop *before* crossing the tracks of another company. The laws of the state permit trains to pass over such crossings without stopping, where adequate interlocking plants are maintained, as is the case at Lathrop.

The second section of the statute, the emergency clause, shows that the law is deemed necessary because "the trains service is very inconvenient and unsatisfactory in some places." The Bill shows that the train service is neither inconvenient nor unsatisfactory at Lathrop, and that the maintenance of an interlocking device makes it more safe to pass trains over the crossing without stopping them, than to stop them at the crossing. It is a matter of common knowledge that

trains which stop at such crossings for the exchange of passengers, usually stop on the crossing.

Respectfully submitted,

E. C. LINDLEY,

M. A. LOW,

Solicitors for Appellee.

HERNDON, PROSECUTING ATTORNEY OF CLINTON COUNTY, MISSOURI, AND SWANGER, [ROACH] SECRETARY OF STATE OF THE STATE OF MISSOURI, *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 150. Argued April 14, 1910.—Decided May 31, 1910.

Objections to a bill for multifariousness and improper joinder of parties must be promptly made, and properly by special demurrer specifically directed to the objection; and so *held* that in the absence of specific objection properly raised at the outset the court can determine in the same action, as against the prosecuting attorney of a State, whether a statute is enforceable under the Constitution of the United States, and, as against the secretary of state, whether the bringing of the action in the Federal court will, under another statute, forfeit complainant's right to do business in the State.

Ex parte Young, 209 U. S. 1, and *West. Un. Tel. Co.* v. *Andrews*, 216 U. S. 165, followed, to effect that an action brought to enjoin state officers charged with the execution of a state statute from enforcing the same on the ground that such statute violates the Federal Constitution is not an action against the State within the prohibition of the Eleventh Amendment.

Where a railroad company has already provided adequate accommodation at any point, a state regulation requiring interstate trains to stop at such point is an unreasonable burden on interstate commerce and void under the commerce clause of the Federal Constitution, and this rule equally applies to junction, as to other, points; and so *held* as to the act of March 19, 1907, amending § 1075, Rev. Stat. of Missouri.

A statute requiring interstate trains to stop at junction points for the convenience of passengers should be construed as a regulation of commerce and not as a police statute for the protection of life and limb.

While the right to do local business within a State may not be derived from the Federal Constitution, the right to resort to Federal courts is one created by that Constitution; and, as against a foreign cor-

poration already established within its borders, a State cannot forfeit the right to do business because of the bringing of an action in the Federal court, and so *held* that the act of March 13, 1907, of Missouri, imposing such a penalty, is unconstitutional and void as to a foreign corporation already in the State at that time.

THE facts, which involve the constitutionality of certain statutes of the State of Missouri, are stated in the opinion.

Mr. James T. Blair, with whom *Mr. Elliott W. Major*, Attorney General of Missouri, and *Mr. Charles G. Revelle* were on the brief, for appellants:

Statutes requiring trains to stop at the intersection of the track on which they are running with the tracks of other railroads are valid as police regulations. *I. & St. L. R. R. Co.* v. *People*, 91 Illinois, 455; *Birmingham R. R. Co.* v. *Jacobs*, 92 Alabama, 191; *R. & D. R. R. Co.* v. *Freeman*, 97 Alabama, 297; *P. & P. U. Ry. Co.* v. *P. & F. Ry. Co.*, 105 Illinois, 117; *C. & A. R. R. Co.* v. *J. L. & A. Ry. Co.*, 105 Illinois, 400; *S. A. & A. P. Ry. Co.* v. *Bowles*, 88 Texas, 639; *Louisville R. R. Co.* v. *E. T. Ry. Co.*, 22 U. S. App. 110; *State* v. *K. C., Ft. S. & G. R. R. Co.*, 32 Fed. Rep. 724; *Ches. & Ohio Ry. Co.* v. *Commonwealth*, 99 Kentucky, 176; *Commonwealth* v. *Ches. & Ohio Ry. Co.*, 29 S. W. Rep. 136; *F. & P. M. R. R. Co.* v. *D. & B. C. R. R. Co.*, 64 Michigan, 370; *K. C. Sub. B. Ry. Co.* v. *K. C., St. L. & C. Ry. Co.*, 118 Missouri, 623; *L. S. & M. S. R. R. Co.* v. *Railway Co.*, 30 Ohio St. 610; 33 Cyc. 670; Freund on Police Power, § 73; *Southern Ry.* v. *King*, 87 C. C. A. 290; Elliott on Railroads, 2d ed., § 668; *Cleveland Ry. Co.* v. *Illinois*, 177 U. S. 522, 523; *Iowa* v. *C. M. & St. P. Ry. Co.*, 122 Iowa, 24.

Appellee is not in a position to assail the act. *Castillo* v. *McConnico*, 168 U. S. 680; *Balt. Traction Co.* v. *Belt R. R. Co.*, 151 U. S. 138. As construed by the state court the statute is designed to secure proper facilities for the

accommodation of those passengers of each intersecting road whose destination is some point on the other. *State* v. *W. & St. L. & P. Ry. Co.*, 83 Missouri, 148; *Logan* v. *H. & St. J. R. R. Co.*, 77 Missouri, 666; *State* v. *Railroad*, 105 Mo. App. 212.

An act affecting different classes may be unconstitutional as to some and valid as to the rest. In such case one of a class within the valid provisions of the act cannot set up the unconstitutionality of the provisions which are inapplicable to him. *Supervisors* v. *Stanley*, 105 U. S. 311; *In re Garnett*, 141 U. S. 12; *Clark* v. *Kansas City*, 176 U. S. 118; *Patterson* v. *Bark Eudora*, 190 U. S. 176; Cooley's Const. Lim., 250; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 318; *Hatch* v. *Reardon*, 204 U. S. 160.

Appellee cannot assail the act as it was in force prior to its entrance into Missouri. *Daggs* v. *Orient Ins. Co.*, 136 Missouri, 398; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 566; *Louis. & Nash. Rd. Co.* v. *Kentucky*, 183 U. S. 512, 513.

The act as construed by the state courts is valid. *N. Y., N. H. & H. R. R.* v. *New York*, 165 U. S. 631; *Missouri* v. *Larabee Mills*, 211 U. S. 621; *Gladson* v. *Minnesota*, 166 U. S. 430; *Cleveland &c. Ry. Co.* v. *Illinois*, 177 U. S. 522; *Mich. Cent. R. R.* v. *Powers*, 201 U. S. 291; *Pacific Express Co.* v. *Seibert*, 142 U. S. 348.

The bill contains no grounds for equitable interposition as against Herndon. *Cruikshank* v. *Bidwell*, 176 U. S. 80; *Pacific Exp. Co.* v. *Seibert*, 44 Fed. Rep. 315. There must be a real and not an imaginary danger of a multiplicity of suits. *T. & B. R. R. Co.* v. *B. H. T. & W. Ry. Co.*, 86 N. Y. 128; *Arbuckle* v. *Blackburn*, 191 U. S. 413, 415.

The bill is bad as it attempts to join two distinct proceedings. Street's Fed. Eq. Prac., § 440; *Gaines* v. *Chew*, 2 How. 642; *Brown* v. *Guarantee Trust Co.*, 128 U. S. 412.

This objection can be taken despite the fact that the question was not raised specifically by the demurrer.

Hefner v. *Northwestern Ins. Co.*, 123 U. S. 751; *Emmons* v. *Nat. Mut. B. & L. Assn.*, 68 C. C. A. 330.

The suit is one against the State within the prohibition of the Eleventh Amendment. *Smyth* v. *Ames*, 169 U. S. 518, 519; *Ex parte Young*, 209 U. S. 149 *et seq.*

This is a suit merely to test the constitutionality of the act by suit against the secretary of state, as such, and cannot be maintained. *Fitts* v. *McGhee*, 172 U. S. 530; *Ex parte Young*, 209 U. S. 156, 157; *In re Ayres*, 123 U. S. 443.

No case being made against the prosecuting attorney the suit against the secretary of state cannot be maintained.

The act against removals is not repugnant to Art. II of the Constitution. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Cable* v. *United States Life Ins. Co.*, 191 U. S. 288.

The guaranty in Art. III as to trial by jury, relates to the trial of crimes. *Nashville &c. Ry.* v. *Alabama*, 128 U. S. 101.

The act does not violate the interstate commerce clause of the Constitution. It specifically permits the transaction of interstate business by appellee even after revocation of its license for violating the act. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 46; *Louis. & Nash. R. R. Co.* v. *Kentucky*, 183 U. S. 512, 518.

Appellee is not denied the equal protection of the laws. *Ducat* v. *Chicago*, 10 Wall. 415; *Norfolk Ry. Co.* v. *Pennsylvania*, 136 U. S. 118.

As no domestic corporation can resort to the Federal courts in cases in which jurisdiction is dependent upon diversity of citizenship, the act instead of destroying equality, effects it. *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 257.

The classification was not an illegal one. *Board of Education* v. *Illinois*, 203 U. S. 561; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 188. Legislation dealing with

railroads as a class has been frequently upheld. *Missouri Ry. Co.* v. *Mackey*, 127 U. S. 209; *Minneapolis Ry. Co.* v. *Beckwith*, 129 U. S. 29; *Missouri Pacific Ry. Co.* v. *Humes*, 115 U. S. 512.

Appellee is not deprived by the revocation of its license of its property without due process of law nor are its privileges and immunities abridged. *National Council U. A. M.* v. *State Council*, 203 U. S. 163.

It is the enforcement of a law contravening the Fourteenth Amendment, not its enactment, which constitutes deprivation without due process. *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 269; *Yesler* v. *Wash. Harbor Line Commissioners*, 146 U. S. 656.

The act abridges no immunity, denies no privilege which appellee could enjoy as a "citizen of the United States." The constitutional provision invoked does not apply to appellee. *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 45, 46; Cooley's Const. Lim., 7th ed., 567; *Slaughter-House Cases*, 16 Wall. 74 *et seq.*

Appellee and its predecessors secured no contract with Missouri under the act of 1870. Contracts between States and railroads are not created by this court by implication in order that acts of state legislatures may be overturned. *Williams* v. *Wingo*, 177 U. S. 603; *Jackson* v. *Lamphire*, 3 Pet. 289; *Stone* v. *Mississippi*, 101 U. S. 816; *Central R. R. & Banking Co.* v. *Georgia*, 92 U. S. 670.

The provisions of general law applicable to foreign railway corporations were not rendered immutable and petrified, by the license taken out in 1902, under the act of 1891. *Schurz* v. *Cook*, 148 U. S. 407; *Gregg* v. *Granby M. & S. Co.*, 164 Missouri, 627; *Bienville Water Co.* v. *Mobile*, 186 U. S. 218; *Stone* v. *Mississippi*, 101 U. S. 816.

A mere license by a State is always revocable. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 540; *Barron* v. *Burnside*, 121 U. S. 199; *Schurz* v. *Cook*, 148 U. S. 409.

The act of 1870 included no guaranty with reference to the right to sue in the Federal courts. No question, as to the State's right to prohibit the institution or removal by appellee of suits by reason of any other ground of Federal jurisdiction, is presented by the bill, and this investigation will be restricted to the case made. *Castillo* v. *McConnico*, 168 U. S. 681; *Supervisors* v. *Stanley*, 105 U. S. 311; *In re Garnett*, 141 U. S. 12; *Patterson* v. *Bark Eudora*, 190 U. S. 176; *Reduction Co.* v. *Sanitary Works*, 199 U. S. 318; *Hatch* v. *Reardon*, 204 U. S. 160.

Mr. M. A. Low, with whom *Mr. E. C. Lindley* was on the brief, for appellee in No. 150:

The grants contained in the several acts of the legislature of the State of Missouri authorizing foreign railway corporations to construct and operate railways are, when accepted, express and binding contracts, the impairment of which is a violation of the Federal Constitution. They are not mere licenses revocable at will. *New Jersey* v. *Yard*, 95 U. S. 104; *N. Y., L. E. & W. Ry. Co.* v. *Pennsylvania*, 153 U. S. 628; *Commonwealth* v. *M. & O. R. Co.*, 64 S. W. Rep. 451.

To add to the contract conditions imposing additional burdens, or taking away substantial rights, is to impair its obligation. *State ex rel.* v. *Cook*, 171 Missouri, 348.

To forbid a railway company to continue to transact its business within the State would be to destroy its property, and it has no power to do that, so long as the company continues to do business in the State in accordance with the terms of the contract under which it was admitted. *American Smelting Co.* v. *Colorado*, 204 U. S. 103. And see *So. Ill. & Mo. Bridge Co.* v. *Stone*, 174 Missouri, 1; *Stevens* v. *Pratt*, 101 Illinois, 217; *Academy* v. *Sullivan*, 116 Illinois, 375.

The act of the legislature of the State of Missouri providing for revoking the license, right and authority of a

non-resident railway company to do business in the State whenever it resorts to a Federal court, impairs the obligations of the contract with the State authorizing appellee to do business in the State, takes its property without due process of law, and deprives it of the equal protection of the laws.

If there be an impairment of the obligation, the amount is not material; this court has power to redress the wrong. *Farrington* v. *Tennessee*, 95 U. S. 679, 683; *Commonwealth* v. *M. & O. R. Co.*, 64 S. W. Rep. 451. The State did not in any statute admitting railroads to do business in the State, reserve the right after the railway company had accepted the grant to deprive it of its right to resort to the jurisdiction of Federal courts. No state legislature can deprive any person of the right to resort in a proper case to the courts of the United States. *Blake* v. *McClung*, 172 U. S. 239, 255; *Cowles* v. *Mercer County*, 7 Wall. 118, and see as to right of a foreign corporation to control its own business, *N. Y., L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628; *Railway Co.* v. *Whitton*, 13 Wall. 270, 286.

The act of March 13, 1907, also denies equal protection of the laws. By the invitation and permission of the State, appellee is doing business therein, and is subject to its process at the instance of suitors, as fully as any domestic corporation. Under such circumstances it is entitled to invoke the protection of this clause of the Federal Constitution. *Northwestern National Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 248; *G., C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 154.

The statute cannot be justified on the ground of classification. Foreign railway corporations which have been admitted to do business in the State upon an equality with domestic corporations, cannot be denied the equal protection of the laws of the State. *St. Tammany Water Works* v. *New Orleans Water Works*, 120 U. S. 64, 71;

M. & St. L. Ry. Co. v. *Beckwith*, 129 U. S. 26; *State* v. *Cadigan*, 50 Atl. Rep. 1079, 1081; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79; *Ex parte Young*, 209 U. S. 123, 146; *Barbier* v. *Connolly*, 113 U. S. 27, 31.

A State cannot give a preference in litigation to its own citizens over those of other States, *Blake* v. *McClung*, 172 U. S. 239, 254–256, nor can it deny to a foreign railway corporation, authorized to operate railways in the State, access to the courts of the land when such right is fully and freely given to every person and to all other foreign corporations, as well as to domestic corporations. *Home Insurance Co.* v. *Morse*, 20 Wall. 445.

The act by reason of the enormous penalties imposed for an unsuccessful effort to test its validity, as well as by reason of the arbitrary power conferred upon the secretary of state, without a hearing, to revoke the license of appellee to do business within the State, takes its property without due process of law.

Due process of law means law in the regular course of administration through courts of justice, Kent, Com., 13. It requires notice, hearing and judgment, *Bertholf* v. *O'Reilly*, 74 N. Y. 519; *Londoner* v. *Denver*, 210 U. S. 373, 385.

The State cannot give its secretary of state purely personal and arbitrary power to take the property of a person or corporation, or to forfeit its right to use that property. *Wynehamer* v. *People*, 13 N. Y. 378, 392; *Hagar* v. *Reclamation District*, 111 U. S. 701, 708.

Cases holding that the licenses of certain transitory corporations, licensed, temporarily, to do business in a State, may be revoked on account of the removal of cases from state to Federal courts, can be distinguished. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 343.

The act requiring all passenger trains to stop at the junction points is an unwarranted interference with interstate commerce. *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S.

142; *Gladson* v. *Minnesota*, 166 U. S. 427; *L. S. & M. S. Ry. Co.* v. *Ohio*, 173 U. S. 285; *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514.

After all local conditions have been reasonably provided for, railways may rightfully adopt special provisions for through traffic, and legislative interference therewith is an unreasonable and unlawful interference with interstate commerce. *Cleveland, C., C. & St. L. Ry. Co.* v. *Illinois*, 177 U. S. 514; *Mississippi R. R. Com.* v. *Illinois Cent. R. Co.*, 203 U. S. 335; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328.

This statute cannot be upheld as a reasonable exercise of the police power in regard to safe passage of the trains of one company across the railroad of another, as its manifest purpose is to provide for the transfer of passengers, baggage, mails and express freight at junction points.

The bill is not multifarious. *Graves* v. *Ashburn*, 215 U. S. 331; *Campbell* v. *Mackey*, 1 Mylne & Craig, 603, 617.

The objection of multifariousness comes too late. Multifariousness is a technical objection, *Brown* v. *Guarantee Trust Co.*, 128 U. S. 403, 412, which must be raised, if at all, at the first opportunity, and if not so presented, it is waived. When it appears on the face of the bill, the objection should be raised by special demurrer. *Billings* v. *Mann*, 156 Massachusetts, 203, 205; 1 Street's Fed. Eq. Pr., § 936; Daniel's Chanc. Pl. & Pr., 6th Am. ed., 586, note 5; *Jackson* v. *Glos*, 144 Illinois, 21.

While the court may, *sua sponte*, raise the objection of multifariousness, even on appeal, there seems to be no case in which it has been done. *Oliver* v. *Piatt*, 3 How. 332, 496.

Mr. James P. Gilmore and *Mr. Gardiner Lathrop*, with whom *Mr. Robert Dunlap* and *Mr. Thomas R. Morrow*

were on the brief, for appellee in No. 151, argued simultaneously herewith:

The act in question is unconstitutional in that it impairs the obligation of a contract between the State of Missouri and the appellee, which had, prior to its passage, complied with the laws of that State relating to the qualification by foreign corporations to do business therein and which had received license or franchise therefor. *State ex rel.* v. *Cook*, 171 Missouri, 348; *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *American Smelting & Refining Co.* v. *Colorado*, 204 U. S. 103; and see the recently decided cases by this court of *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Pullman Company* v. *Kansas*, 216 U. S. 56; and also *Railroad Co.* v. *Pennsylvania*, 153 U. S. 628; *Gordon* v. *Appeal Tax Court*, 3 How. 133.

A contract created by a charter cannot be impaired during the life of the charter grant. *Attorney General* v. *Bank*, 4 Jones Eq. (N. C.) 287; *Wendover* v. *City*, 15 B. Monroe (Ky.), 258; *Commonwealth* v. *Mobile & Ohio R. R. Co.* (Ky.), 64 S. W. Rep. 451; *Bank* v. *Knoop*, 16 How. 369.

Similar statutes imposing burdens on foreign corporations were held unconstitutional in *Seaboard Railway Co.* v. *Railroad Commission*, 155 Fed. Rep. 792; *Railway Co.* v. *Ludwig*, 156 Fed. Rep. 152; *Western Union Telegraph Co.* v. *Julien*, 169 Fed. Rep. 166; *Railroad Co.* v. *Cross*, 171 Fed. Rep. 480.

The act deprives appellee of its property without due process of law. As the appellee acquired its railroad in the State of Missouri, with privileges and franchises appurtenant thereto, which included the right to use the same in the transportation of persons and property under the act of 1870, these rights and franchises appurtenant to the property became vested, and the State could not thereafter under the act of 1907 impose an arbitrary or

unreasonable condition upon the further exercise of such rights. After the rights and privileges had become vested, the State could only impose such reasonable police regulations concerning the use of the property and the conduct of the business as would be necessary to protect the public in general. *Society for Savings* v. *Coyte*, 6 Wall. 594; *Hamilton County* v. *Massachusetts*, 6 Wall. 632; *California* v. *Railroad Co.*, 127 U. S. 1; *State ex rel.* v. *Ackerman*, 51 Ohio St. 163; *Life Insurance Co.* v. *County*, 28 Montana, 484; *State* v. *Railroad*, 43 Minnesota, 17; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Railroad Company* v. *Hewes*, 183 U. S. 66. See also *Railway Co.* v. *Sullivan*, 173 Fed. Rep. 556.

Rights and privileges which attach to the use of the property, when they become vested under the law of the State, are property rights which cannot be taken away without compensation by the State. *Gulf & S. I. R. R. Co.* v. *Hewes*, 183 U. S. 77; *Monongahela &c. Co.* v. *United States*, 148 U. S. 312; *Wilcox* v. *Cons. Gas Co.*, 212 U. S. 22, 44; *Brunswick & T. Water Dist. Co.* v. *Maine Water Co.*, 59 Atl. Rep. 537; *Garfield* v. *Goldsby*, 211 U. S. 249, 262.

The action of the secretary of state in cancelling the permit and forfeiting rights is unrestricted without any provision to protest against his decision in the first instance, or to review it after it has been made. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Murray's Lessees* v. *Lancow*, 18 How. 272; *Holden* v. *Hardy*, 169 U. S. 366; *Scott* v. *McNeal*, 154 U. S. 34; *Barbier* v. *Connolly*, 113 U. S. 27; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *In re Quong Wo*, 13 Fed. Rep. 229; *In re Wo Lee*, 26 Fed. Rep. 471; *Barthet* v. *City*, 24 Fed. Rep. 563.

The action of the secretary of state is also made conclusive, which, under the circumstances of this case, cannot be permitted. It is not even subject to review in subsequent prosecutions for penalties. *Railway Co.* v.

Minnesota, 134 U. S. 418; *Felix* v. *Wallace County*, 62 Kansas, 832; *Railway Co.* v. *Simmonson*, 64 Kansas, 802; *Railway Co.* v. *Payne*, 33 Arkansas, 816; *Mayer* v. *Verlandi*, 39 Minnesota, 438.

The penalty provisions of the statute in question are so excessive and unreasonable that they violate the Fourteenth Amendment to the Constitution of the United States and result in depriving appellee of its property without due process of law. *Ex parte Young*, 209 U. S. 123.

The *Prewitt Case*, 202 U. S. 246, and other cases can be distinguished. *Insurance Co.* v. *Morse*, 20 Wall. 445; *Bigelow* v. *Nickerson*, 70 Fed. Rep. 113; *Reimers* v. *Seatco Mfg. Co.*, 70 Fed. Rep. 573.

The right of a State to impose conditions upon foreign corporations doing business therein is not unlimited. *Insurance Co.* v. *French*, 18 How. 404; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *American Refining & Smelting Co.* v. *Colorado*, *supra*, also distinguished.

MR. JUSTICE DAY delivered the opinion of the court.

This suit was brought by the Chicago, Rock Island and Pacific Railway Company in the Circuit Court of the United States for the Western District of Missouri to enjoin the execution of certain provisions of the acts of the legislature of the State of Missouri, as violative of complainant's rights under the Federal Constitution. The bill was filed against Harry T. Herndon, prosecuting attorney of Clinton County, Missouri, and John E. Swanger, secretary of state of the State of Missouri.

The bill is very lengthy, and as the decision of the court was made upon demurrer to it, it will be necessary to call attention to some of its pertinent allegations. Complainant avers that it is a duly organized corporation of the

State of Illinois, operating a railroad in certain States, among others, in the State of Missouri, and is engaged in both state and interstate commerce. It sets forth in detail the acts of the State of Missouri authorizing the consolidation, extension and operation of the railroads under which it claims to have acquired its system of railroads in that State. It avers that it duly filed with the secretary of state of the State of Missouri a copy of its charter, in compliance with the laws of the State, and received a certificate, November 22, 1902, in all respects in compliance with the laws of the State, authorizing the complainant to carry on business in said State for the term ending April 3, 1903, which certificate is in full force, never having been cancelled or withdrawn.

The bill sets forth the act of March 19, 1907, amending § 1075 of the Revised Statutes of Missouri, requiring railroad companies to perform certain duties, among others to stop passenger trains at the junction or intersecting points of other railroads. As that amended section is one of the acts complained of it is set forth in the margin.[1]

[1] SEC. 1075. Every railroad corporation in this State which now is, or may hereafter be, engaged in the transportation of persons or property, from one point in this State to another point in this State, shall give public notice of the regular time of starting and running its cars, and shall furnish sufficient accommodations for the transportation of all such passengers, baggage, mails and express freight as shall, within a reasonable time previous thereto, be offered for transportation at the place of starting, at the junctions of other railroads, and at the junction of branch railroads of the same system as herein defined, carrying passengers, and at the several stopping places; and shall, at all crossings and intersections of other railroads, where such other railroad and the railroad crossing the same are now, or may hereafter be made upon the same grade, and the character of the land at such crossing or intersection will admit of the same, erect, build, and maintain, either jointly with the railroad company whose road is crossed, or separately by each railroad company, a depot or passenger house and waiting room or rooms sufficient to comfortably accommodate all passengers

Concerning this section, and the requirement to stop trains at junction points, the bill sets out that the complainant has traffic rights over the Chicago, Burlington and Quincy Railway track between Cameron Junction and Kansas City; that the town of Lathrop is a town of about one thousand inhabitants, situated in Clinton County, Missouri, between Cameron Junction and Kansas City on said line of railway; that complainant, for the purpose of carrying on its business as a common carrier, at the said station of Lathrop stops a morning and evening passenger train each way, two west bound, and two east bound, and, in addition thereto, stops two passenger trains, one east bound and one west bound, which are local freight trains regularly carrying passengers. Complainant further sets forth that it runs a fast through passenger train between Chicago, Fort Worth, and Dallas, Texas, by means of connecting carriers in the State of

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awaiting the arrival and departure of trains at such junction, or railroad crossing, and shall keep such depot or passenger house or rooms warm, lighted and open to the ingress and egress of all passengers for a reasonable time before the arrival and until after the departure of all trains carrying passengers on said railroad or railroads; and they are hereby required to stop all trains carrying passengers at the junction or intersection of other railroads, and they are further required to receive all passengers and baggage for, and to stop, on a flag or signal, all trains carrying passengers, at the junction of all branch railroads of the same system, which said branch railroads are eighteen miles or more in length and at the terminus of which is located any county seat town of any county in this State a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express freight from the trains of railroads so connecting or intersecting; or they may mutually arrange for the transportation of such persons and property over both roads without change of cars; and they shall be compelled to receive all passengers and freight from such connecting, intersecting, or branch roads whenever the same shall be delivered to them. And every railroad company or corporation owning, operating or leasing any railroad in this State shall keep all its depots, stations, or passenger houses, whether located at the crossing or intersection of

Texas, and a fast through passenger train between Chicago and the Pacific coast by means of connecting carriers beyond the Territory of Oklahoma, neither of which stop at the station of Lathrop to take on or let off passengers; that said trains which do not stop at Lathrop are immediately preceded by trains that do stop there, and which are maintained for the purpose of collecting passengers from local stations and conveying them to nearby stations on the line of the road of the complainant, where both of said fast through trains do stop for the purpose of taking on and letting off passengers.

The complainant further avers that the tracks of the complainant cross and intersect with the tracks of the Atchison, Topeka and Santa Fe Railway Company at the said station of Lathrop; that the Atchison, Topeka and Santa Fe Railway runs two trains each way every day, all of which stop at the station of Lathrop, and which make close and direct connection with the trains which the

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other roads or elsewhere, warm, lighted and open to the ingress and egress of all passengers a reasonable time before the arrival and until after the departure of all passenger trains on said railroad which stop or receive or discharge passengers at such depots, stations or passenger houses. Every railroad corporation or company which shall fail, neglect or refuse to comply with any or either one of the provisions of this section from and after the time the same shall become a law, shall, for each day said railroad corporation or company refuses, neglects or fails to comply therewith, shall forfeit and pay the sum of twenty-five dollars, which may be recovered in the name of the State of Missouri, to the use of the school fund of the county wherein said crossing, depot, station, passenger house or branch railroad is located; and it shall be the duty of the prosecuting attorney to prosecute for a recovery of the same. The term "railroad corporations," as used in this act, shall include the term "railway company and railway corporation."

SEC. 2. Inasmuch as the train service is very inconvenient and unsatisfactory in some places constitutes an emergency within the meaning of the constitution; therefore, This act shall take effect and be in force from and after its passage.

complainant stops at the station of Lathrop; that except under unusual circumstances passengers seldom find it convenient to change from the complainant's railway to that of the Atchison, Topeka and Santa Fe line at the station of Lathrop. Complainant avers that to stop the through interstate trains running between Chicago, Fort Worth and Dallas, Texas, and between Chicago and the Pacific coast would be a direct, unreasonable and unwarrantable interference with its interstate business, and that said through trains are maintained for and are essential to the purpose of transporting interstate passenger traffic, and for the carriage of the United States mails. The complainant avers that the facilities for the interchange of passengers at the station of Lathrop are amply sufficient to accommodate the public, and that the service is both convenient and satisfactory to the public. The bill further avers that if the said through trains are required to stop at all junctions with other railways and there interchange passengers with such road, their usefulness as through trains will be destroyed, and the interstate business of the complainant interfered with to an unwarranted extent without any corresponding benefit to the traveling public; that the law of March 19, 1907, as applied to said trains which do not stop at the station of Lathrop, is a serious burden upon interstate commerce so conducted by said trains, and an unlawful and unreasonable interference therewith, and in violation of the Constitution of the United States and the acts of Congress regulating commerce. Complainant avers that the act of March 19, 1907, requiring trains carrying passengers to stop at the junction or intersections of other roads for the purpose of interchanging passengers and baggage at such junction points, was not passed in the exercise of the police power of the State of Missouri to protect the traveling public, but solely for the purpose of increasing traveling facilities, and to provide a more convenient and satis-

factory train service at such junction points. Complainant avers that it installed an interlocking plant and an automatic signal device at the intersection with the tracks of the Atchison, Topeka and Santa Fe Railway at the station of Lathrop, and thereby provided an absolutely safe method for its through trains to pass over the tracks of the Atchison, Topeka and Santa Fe road without stopping. The bill avers that Harry T. Herndon, as prosecuting attorney for the county of Clinton, Missouri, threatens to and will, unless enjoined, put in motion the special provisions of the act of March 19, 1907, for the enforcement of penalties of $25 per day since July 21, 1907, which penalties in a short time would amount to many thousands of dollars.

Complainant further avers that defendant John E. Swanger, secretary of state of the State of Missouri, under and by authority of said act of the State of Missouri, approved March 13, 1907, concerning the bringing of cases by foreign corporations in the Federal courts, which act is set forth in the margin [1] threatens to, and will, unless

[1] Be it enacted by the General Assembly of the State of Missouri, as follows:

SEC. 1. If any foreign or non-resident railway corporation of whatever kind, incorporated, created and existing under the laws of any other State, Territory or country, and doing business as a carrier of freight or passengers from one point in this State, to another point in this State, under the laws of this State, regulating or authorizing the licensing of, or the issuing of a permit or a certificate of authority to, or suffering or allowing any such corporation to enter or to do business in this State, shall, without the consent of the other party, in writing, to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, the license, permit, certificate of authority and all right of such corporation and its agents to carry passengers or freight from one point in this State to another point in this State shall forthwith be revoked by the secretary of state, and its right to do such business shall cease, and the secretary of state shall publish such revocation in

enjoined, cancel the complainant's certificate of the right to do business in the State of Missouri, and will take other steps necessary to revoke the license and permit as provided in the act of March 13, 1907, should the complainant file this, its bill of complaint, in the United States Circuit Court, and because of any attempt complainant

some newspaper of large and general circulation in the State, and such corporation shall not again be authorized or permitted to carry passengers or freight from one point in this State to another point in this State, or to do business as a carrier of passengers or freight of any kind from one point in this State to another point in this State at any time within five years from the date of such revocation or the cessation of such right. But the revocation of such license, permit, right, certificate of authority, or the cessation of such right, shall not be deemed to prohibit or prevent such corporation from carrying passengers or freight from a point within this State to a point without this State, or from a point without this State to a point within this State, or from making what are known as interstate shipments and transportation.

SEC. 2. If any corporation included in the provisions of this act shall carry, or attempt to carry, or hold itself out to carry passengers or freight of any kind from one point in the State to another without a license, permit or certificate of authority therefor first had and obtained from the State of Missouri—to be issued by the secretary of state—or after its license, permit, right or certificate of authority to carry passengers or freight of any kind from one point in this State to another point in this State, shall have been revoked or ceased, as provided for by the preceding section of this act, it shall forfeit and pay to the State of Missouri for each offense a penalty of not less than two thousand dollars nor more than ten thousand dollars, suit to be brought therefor in any court of competent jurisdiction by the attorney general or the prosecuting attorney of any county in the State in which such offense shall have been committed, and such offense shall be deemed to have been committed either in the county where such transportation originated or in the county where it terminated. And the governor may, whenever he shall deem it necessary, appoint special counsel to assist the attorney general or any prosecuting attorney to enforce or carry out the provisions of this act.

SEC. 3. All acts or parts of acts in conflict herewith are, in so far as they are in conflict, hereby repealed.

Approved March 13, 1907.

[Laws of Missouri of 1907, p. 174.]

may make to remove any case in a Federal court from any state court of the State of Missouri, and to bring any case in any Federal court against a citizen of the State of Missouri. The bill then sets out the coming of the complainant into the State of Missouri in accordance with the laws of the State, that it acquired property therein, which included many miles of railroad, depots, station grounds, shops and warehouses, terminals, rolling stock, and other equipment necessary to the maintenance and operation of its line located in the State of Missouri and at an assessed value of $3,252,775. The bill sets out the various particulars wherein it is contended that the act of March 13, 1907, is void under the Constitution of the United States, and the bill avers that if the complainant should attempt to remove into the Federal courts any case commenced in the state courts of Missouri, or should commence proceedings in any Federal court against a citizen of the State of Missouri, the defendant, as secretary of state of the State of Missouri, would deny the right of complainant to do business in the State of Missouri, and if the complainant attempted to carry on the same it would be subject to forfeit and to pay to the State of Missouri a penalty of not less than $2,000 or more than $10,000, to be recovered in any court in the State having jurisdiction. An injunction was prayed against the defendant Harry T. Herndon as prosecuting attorney of the county of Clinton, Missouri, requiring him to refrain from enforcing, or attempting to enforce, the provisions of the act of March 19, 1907, so far as it relates to the stopping of the trains aforesaid, at the crossing of the Atchison, Topeka and Santa Fe Railway at the station of Lathrop, Clinton County, Missouri, and from enforcing, or attempting to enforce, the penalties of the statute; and that the defendant John E. Swanger, secretary of state of the State of Missouri, be restrained from enforcing, or attempting to enforce, the provisions of the act of March 13, 1907,

providing for the revocation and cancelling of the complainant's charter because of the removal of cases from a state to a Federal court, or bringing suit in a Federal court against any citizen of the State of Missouri.

A demurrer was filed to the bill by both of the defendants, the same was overruled, and a final decree was entered enjoining the enforcement of the act of March 13, 1907, because of the beginning of the suits, or the removal of cases to Federal courts, and enjoining the enforcement of the act of March 19, 1907, so far as it relates to the complainant's said trains passing through Lathrop, or the stopping of such trains at the station of Lathrop, and enjoined the defendant prosecuting attorney of Clinton County, Missouri, from enforcing, or attempting to enforce, the provisions of said act as to stopping said trains, or enforcing the penalties provided for in that act for the failure to comply with the provisions thereof.

It is evident from the foregoing statement that the constitutional questions involved in this case are: First, whether under the act of March 19, 1907, the complainant can be compelled to stop its through trains, described in the bill, at the station of Lathrop, and whether such a statute, so far as it relates to interstate commerce trains, is void as an attempt to regulate interstate commerce, and imposes a burden thereon by state legislation. And, secondly, under the act of March 13, 1907, can the license and right of the complainant to do business in the State of Missouri be lawfully revoked because it has begun a suit, or may remove a suit, from a state court to a Federal court, complainant being a corporation organized in another State.

Before considering these questions we will notice some of the objections to the decree below made by the learned counsel for the State. It is asserted that the bill is multifarious, and that there is no right to join the defendants, the prosecuting attorney and secretary of state in the

same bill. But no objection to such joinder of the parties was specially taken, and it is well settled that an objection of this character must be promptly made. The proper way to raise such question is by special demurrer specifically directed to the objection. Street Fed. Equity Practice, vol. 1, § 936. It is true that a court may itself take the objection in extreme cases, when that course is essential to the necessary and proper administration of justice. But, as laid down in *Oliver* v. *Piatt*, 3 How. 333, 412, Mr. Justice Story, speaking for the court, says, "if the court can get to a final decree without serious embarrassment, it will do so," and, continues the learned justice: "*A fortiori*, an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity." No such case exists here. Certainly, in the absence of a specific objection, there is no difficulty in hearing at the same time the case against the secretary of state and the prosecuting attorney. The bringing of the suit against the prosecuting attorney in the Federal court, if the statute of March 19, 1907, is to be carried out, will forfeit the complainant's right to do business within the State, and we see no reason why the right to declare such forfeiture may not be considered with the case against the prosecuting attorney. We find no merit in the objection of multifariousness.

As to the objection that the suit is one against the State, we think no discussion is necessary, and content ourselves with a reference to the late cases in this court to that point. *Ex parte Young*, 209 U. S. 123; *Western Union Telegraph Co.* v. *Andrews*, 216 U. S. 165.

The act of March 19, 1907, requiring the stopping of certain trains, upon its face seems to require the stoppage of all passenger trains at the junction or intersection of other roads. But it is contended by counsel for the State that this statute is but an amendment of former statutes, and that the requirement to stop trains carrying pas-

sengers, as qualified by the subsequent language of the act, means to stop such trains for a sufficient length of time to allow the transfer of passengers, personal baggage, mails and express from the trains of the roads connecting or intersecting to the trains of the other road, and that, therefore, the act applies only to the operation of trains actually carrying such passengers, personal baggage, mails and express as are destined for points on the connecting road, and does not require the stoppage of all trains carrying passengers, as is set out in the bill. And this conclusion, it is said, must necessarily follow because of the construction given to the statute prior to its amendment on March 19, 1907. *State ex rel.* v. *The W. St. L. & P. Ry. Co.*, 83 Missouri, 148; *Logan* v. *H. & St. J. R. R. Co.*, 77 Missouri, 666; *State ex rel.* v. *Railroad*, 105 Mo. App. 212.

The contention is that the amendment of 1907 has only the effect to bring into the statute certain provisions as to branch railroads. Assuming this to be a correct interpretation of this statute, and that it only requires the stoppage of trains at Lathrop carrying passengers destined for points on the intersecting railroad, or to take up passengers there destined for points on complainant's road, the question remains, Would the requirement of the act of March 19, 1907, to stop the through trains described in the bill, for such purpose and under the circumstances set forth, be an unlawful attempt to regulate interstate commerce and impose an unlawful burden thereon?

The extent of the right to control through interstate transportation of passengers by state legislation, or under orders of a commission authorized by the State, has been recently before this court. *Miss. R. R. Co.* v. *Illinois Central R. R. Co.*, 203 U. S. 335; *Atlantic Coast Line Co.* v. *Wharton*, 207 U. S. 328.

The principle to be deduced from these cases is, that where a railroad company has already provided ample

facilities for the adequate accommodation of the traveling public such as may be proper and reasonable at any given point, and operates interstate commerce trains, carrying passengers through the same places, at which such interstate trains do not stop, a state regulation which requires the stopping of such interstate trains, in addition to ample facilities already provided, to the detriment and hindrance of interstate traffic, is an unlawful regulation and burden upon interstate commerce. Applying the principles thus settled and taking the allegations of the bill as true, which we must do in view of the fact that the case was decided upon demurrer, we think that construing the statute so as to require the stoppage of the through trains whenever any persons might seek to avail themselves thereof, in order to permit a transfer of passengers from one road to the other upon such trains, would be an unnecessary and unlawful burden upon interstate traffic. The averment of the bill is that the business is already amply provided for in the other trains of the company and the connecting road, and the serious detriment to the interstate carrying business from the requirement to stop the through trains described for the purpose of permitting such transfers, is fully set forth in the bill, and admitted by the demurrer.

It is true that the bill avers that few persons require transfer at such connecting point, but if passengers have the right under this statute to require the stoppage of such through trains at Lathrop whenever they may desire to avail themselves of such privilege, serious inconvenience would result to the interstate traffic in question. It is to be remembered that this statute is not of that class passed in the exercise of the police power of the State for the promotion of the public safety and requiring the stoppage of trains by one railroad before crossing the tracks of another railroad—this statute, as its second section shows, was passed for the purpose of providing

greater facilities of travel, and not for the protection of life and limb. We therefore reach the conclusion that the Circuit Court did not err in granting the injunction so far as it relates to the enforcement of the act of March 19, 1907, relating to the stoppage of the interstate commerce trains at the station at Lathrop.

As to the validity of the act of March 13, 1907, forfeiting the right of the company to do business in the State of Missouri, and subjecting it to penalties in case it should bring a suit in the Federal courts, or remove one from the state courts to the Federal courts, but little need be said. This is so because of the cases decided at this term involving contentions kindred to the one made in this case. See *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Pullman Co.* v. *Kansas*, 216 U. S. 56; *Ludwig* v. *Western Union Tel Co.*, 216 U. S. 146; *Southern Railway Co.* v. *Green*, 216 U. S. 400.

Applying the principles announced in those cases, it is evident that the act in controversy cannot stand in view of the provisions of the Constitution of the United States. Moreover, this is not a case where the State has undertaken to prevent the coming of the corporation into its borders for the purpose of carrying on business. The corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection. Under the statute in controversy a domestic railroad company might bring an action in the Federal court, or in a proper case remove one thereto, without being subject to the forfeiture of its right to do business, or to the imposition of penalties provided for in the act. In all the cases in this court, discussing the right of the States to exclude foreign corporations, and to prevent them from removing cases to the Federal courts, it has been conceded that

while the right to do local business within the State may not have been derived from the Federal Constitution, the right to resort to the Federal courts is a creation of the Constitution of the United States and the statutes passed in pursuance thereof.

It is enough now to say that within the principles decided at this term, in the cases cited above, the act of March 13, 1907, as applied to the complainant railroad company, in view of the admitted facts set out in the bill in this case, is unconstitutional and void. We find no error in the decree granted in the Circuit Court, and the same is affirmed.

Affirmed.

THE CHIEF JUSTICE concurs in the result.